

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION

FUNCTION MEDIA, LLC                   \*     Civil Docket No.  
   \*     2:07-CV-279  
VS.                                   \*     Marshall, Texas  
   \*  
   \*     January 26, 2010  
GOOGLE, INC.                       \*     8:00 A.M.

TRANSCRIPT OF JURY TRIAL  
BEFORE THE HONORABLE CHAD EVERINGHAM  
UNITED STATES MAGISTRATE JUDGE

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(Proceedings recorded by mechanical stenography,  
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12 P R O C E E D I N G S

13  
14 COURT SECURITY OFFICER: All rise.

15 (Jury in.)

16 THE COURT: All right. Please be seated.

17 Good morning, Ladies and Gentlemen.

18 Thank you again for being here timely.

19 You're about to move into the Plaintiff's  
20 rebuttal case. And I anticipate that the testimony of  
21 the rebuttal case will be fairly brief, and then we'll  
22 take a break and then come back to the final arguments  
23 of counsel and the -- and the Court's instructions.  
24 Okay. Call your first witness.

25 MR. GRINSTEIN: Your Honor, Plaintiff

1 calls Dr. Tom Rhyne.

2 THOMAS RHYNE, PH.D., PLAINTIFF'S WITNESS, PREVIOUSLY

3 SWORN

4 DIRECT EXAMINATION

5 BY MR. GRINSTEIN:

6 Q. Welcome back, Dr. Rhyne.

7 A. Thank you.

8 Q. Were you in the courtroom when Mr. Lanning was  
9 testifying about -- as to the validity of the patents?

10 A. I was.

11 Q. And do you agree with the opinions that he  
12 offered?

13 A. He and I have come to very different  
14 conclusions.

15 Q. In your opinion, are the patents that Function  
16 Media has asserted in this case valid?

17 A. I think that they are.

18 Q. Let me ask you just a background question or  
19 two.

20 Have you reviewed the references that  
21 Mr. Lanning discussed during his direct testimony?

22 A. Basically, he dealt with three: The AdForce  
23 system, the DoubleClick system, and if I say Netscape at  
24 any point during my testimony, I mean NetGravity. It's  
25 just so hard for me not to use the other term, but the

1 NetGravity system.

2           And I've reviewed every one of the documents  
3 that have been produced. I've read the deposition  
4 transcripts from the people who talked about it at  
5 deposition, and I was here for the trial testimony going  
6 through those three systems.

7           Q.   And from reviewing all those materials, have  
8 you come to an opinion about the state of the art of  
9 internet advertising in the late 1990s?

10          A.   I have. It's kind of interesting. If you  
11 think about the highway system was developed and people  
12 got cars and it opened up an opportunity to put  
13 advertisements on billboards on the side of the road.  
14 It created a new kind of advertising opportunity that  
15 hadn't been around. In fact, if you're as old as I  
16 am --

17                   MR. VERHOEVEN: Beyond the scope of the  
18 report.

19                   THE COURT: Well, counsel approach.  
20                   (Bench conference.)

21                   MR. VERHOEVEN: Well, Your Honor, this  
22 is --

23                   THE COURT: No, sustained.

24                   (Bench conference concluded.)

25           Q.    (By Mr. Grinstein) Dr. Rhyne, can you explain

1 whether or not any of the references that you reviewed  
2 include any concept of automatic creation of ads  
3 formatted to publisher's rules?

4 A. It's simple. I've looked at all three of  
5 those. And individually or collectively, none of the  
6 three teach this concept of having an automatic  
7 processing step done by a computer system to make an  
8 advertisement that was entered in generic form by a  
9 seller be made to comply with presentation rules that  
10 were entered by the publisher.

11 MR. GRINSTEIN: Can we please see the  
12 definition of processing that the Court has provided?

13 Q. (By Mr. Grinstein) Dr. Rhyne, can you, using  
14 this definition of processing that the Court has  
15 provided, explain why this automatic creation feature  
16 that you just mentioned is relevant to the issue of  
17 anticipation?

18 A. Well, again, this phrase, processing the  
19 electronic advertisement in compliance with the  
20 presentation rules on the internet media venues, is in  
21 that last step of the claim where I think someone  
22 characterized it as the long one.

23 And the Court has said that it requires  
24 executing a systemic sequence of mathematical or logical  
25 operations upon the customized electronic advertisements

1 to make it comply with the presentation rules of the  
2 internet media venues.

3 And what that says is that before you get to  
4 the processing step, that advertisement won't comply.  
5 And then that step is performed, and the advertisement  
6 then complies. And it's just something that is -- it  
7 wasn't around before the Function Media patent was set  
8 forth.

9 Q. And, Dr. Rhyne, can you remind us, who bears  
10 the burden on the invalidity issue?

11 A. Well, Mr. Lanning does representing Google.  
12 It's -- it's something that I'm here to rebut, but I  
13 don't have -- I don't have the responsibility of  
14 providing, I think I heard, clear and convincing  
15 evidence that the patent, which has been approved and  
16 presumed valid by the Patent Office, has -- really, the  
17 mistake was made. I don't carry the ball on that one.

18 Q. Okay. I want to talk to you about the  
19 specific references that Mr. Lanning discussed, and  
20 first let's discuss DoubleClick.

21 On the basis of your study, Dr. Rhyne, does  
22 DoubleClick either anticipate or render obvious the  
23 Function Media patents?

24 A. Well, contrary to the opinion that was offered  
25 by Mr. Lanning, I don't think either of those cases is

1 true based on the DoubleClick reference as described in  
2 the documents that I've reviewed.

3 Q. And what are the two reasons or two main reaps  
4 you're going to talk about today why you think  
5 DoubleClick doesn't do what the Function Media patents  
6 do?

7 A. Well, it was referred to, I think, in one of  
8 the early slides that -- that was used with his  
9 presentation as an integrated system that served both  
10 publishers and sellers. And I don't believe that there  
11 is such an integrated system. I think they're two  
12 separate systems, which were not integrated together.

13 And, secondly -- and this will be true for all  
14 three of these references -- there is no disclosure in  
15 that system of that publishing, that processing step.  
16 There is no automatic processing that's done to make an  
17 advertisement that's going to be displayed on a website  
18 by the DoubleClick system. Either one of them be made  
19 to comply with presentation rules that were entered by a  
20 publisher.

21 Q. Let's talk about that first reason first.  
22 Do you agree with Mr. Lanning or disagree with Mr.  
23 Lanning that DoubleClick was an integrated system?

24 A. I disagree.

25 Q. And can you explain to us, I guess even using

1 the language of the Claim 1 of the '025 patent, why it's  
2 relevant to the issue of anticipation, your opinion that  
3 DoubleClick was not an integrated system?

4       A.     Well, I can't quite see it, but I know it.  
5 Okay. The very first paragraph, the preamble says, a  
6 computer system for creating and publishing customized  
7 electronic advertisements. And when you work your way  
8 down, that system has to have both a first interface for  
9 the internet media venues, and later on a second  
10 interface for the sellers.

11             And what we've got with the DoubleClick system  
12 is one system called DoubleClick for Advertisers that is  
13 intended to allow advertisers to work with publishers to  
14 do advertisements on the publisher's sites.

15             But then we have a separate system that is  
16 DoubleClick for Publishers; has a different name; has a  
17 different target. It's designed to let publishers go  
18 out and find advertisers.

19             And while they share some common back-end  
20 capabilities, they are two separate systems with  
21 different audiences as their targets and different  
22 characteristics.

23       Q.     Well, did you hear in this trial Mr. Rupp and  
24 Ms. Delfau testify that those two shared some software?

25       A.     I heard them talk -- in fact, particularly Mr.



1 Rupp talked about some software components that were  
2 able to be used in both DFP and DFA, the DoubleClick for  
3 Publishers and then the other system, the DoubleClick  
4 for Advertisers.

5 Q. Does the sharing of software or software  
6 modules between DFA and DFP mean that those two systems  
7 were integrated?

8 A. No.

9 Q. Why not?

10 A. Well, I've managed a lot of complex software  
11 development projects, and one of the things you like to  
12 have is reusability. If you're going to have software  
13 developers develop a particular program, maybe it's a  
14 program for word processing, it might be useful to take  
15 that word processing program that you've invested in the  
16 development of and use it in another area than the one  
17 that was originally there.

18 And after listening to what Mr. Rupp said, I  
19 came to the conclusion that what he was talking about is  
20 that the people at DoubleClick developed some sort of  
21 generic software modules, and in the software  
22 development process, it's called reusability.

23 That some of those modules could be used over  
24 in the DFP system, and some of those modules could also  
25 be installed in and used in the DFA system, but they

1 weren't bridging across between the two systems. They  
2 were separately used. It's just that it was the same  
3 piece of software.

4 Q. Do you have an analogy?

5 A. Well, I thought about it. Think about a  
6 company like General Motors.

7 MR. VERHOEVEN: Objection, Your Honor.  
8 None of this is in the report.

9 THE COURT: Overruled.

10 A. Okay. If you think about a company like  
11 General Motors in Detroit, there are a lot of  
12 third-party companies that make components that are used  
13 in cars. And -- and let's say a company makes a bucket  
14 seat, all right? And they sell it to General Motors,  
15 and General Motors says that's a really good seat. I'm  
16 going to use it in this model of the Chevrolet, and I'm  
17 going to install it in this model of the Oldsmobile.  
18 And, heck, I may even put it in a Corvette, okay?  
19 But that doesn't mean that the Corvette, the Chevrolet,  
20 and the Oldsmobile are the same system. It just means  
21 that there was a reusable component that was shared  
22 among different automobiles.

23 Q. (By Mr. Grinstein) Did you hear Mr. Rupp  
24 testify in Court that if someone at DoubleClick had  
25 pulled the plug on the DoubleClick back-end systems,

1 that would have had an impact on DFP and DFA?

2 A. Yes.

3 Q. And what's your opinion as to that?

4 A. That -- that does not in any way change my  
5 opinion about DFP and DFA being separate systems.

6 Q. What were the back-end systems he was  
7 referring to?

8 A. I went back and reread his testimony both at  
9 his deposition and at trial. And the DoubleClick  
10 back-end systems perform some basic functions that were  
11 required. One of the things they did was detect -- look  
12 for click fraud.

13 Now, click fraud is an interesting thing. If  
14 a publisher makes money when people click on  
15 advertisements that have been placed on that publisher's  
16 website, one thing some publishers, maybe not so nice,  
17 might do is to put some ads on their website and then  
18 they click on them themselves. Every time they click on  
19 them, they make a nickel or 50 cents or whatever it's  
20 going to be, some amount of money.

21 So they might just bring somebody in off the  
22 street and say I want you to sit here all day and every  
23 time you see an ad on my website, click on it. There  
24 are ways to detect for that, a lot of very clever ways  
25 to do that. And part of the back-end system looked for

1 that.

2           The other thing the back-end system did was  
3 some of the billing-type accounting, recognizing whose  
4 ads had been clicked on, and so you have to charge the  
5 seller and you have to pay the publisher for that.  
6 But they weren't -- they weren't advertising type  
7 things. They were back-end systems.

8           Q.    Okay. Let's talk about DFP.

9           Can you describe for the jury what DFP,  
10 DoubleClick for Publisher, or DART for Publishers was?

11          A.    It's a service offered by the DoubleClick  
12 Company to publishers, and the publishers had to go out  
13 and round up some advertisers and find people who would  
14 be willing to pay money to put their advertisements on  
15 that publisher's website.

16               And DoubleClick then provided a software  
17 system that allowed the advertisements from those  
18 advertisers to be installed in a computer system exactly  
19 as the advertiser had originally created. And then the  
20 DoubleClick system would pick up those ads kind of in  
21 rotation and say, well, right now, I'm going to display  
22 this one on that publisher's website, and then I'll go  
23 get another one and put it on the website and do another  
24 one.

25               But it was for publishers who organized their

1 own set of advertisers, and the advertisers provided  
2 fully, complete descriptions of what their  
3 advertisements should look like.

4 MR. GRINSTEIN: Your Honor, may I  
5 approach the witness?

6 THE COURT: Yes.

7 Q. (By Mr. Grinstein) Dr. Rhyne, I'm handing you  
8 a notebook of exhibits. And I'd like you to turn to  
9 Exhibit DX149. It's a DoubleClick document.

10 A. I have that.

11 Q. Is this one of the documents that you analyzed  
12 in this case?

13 A. It was. I remember the handwritten note from  
14 Ms. Delfau on the front cover.

15 Q. Can you turn to Page 12?

16 MR. GRINSTEIN: And, Matt, if you  
17 wouldn't mind blowing that up a little bit.

18 Q. (By Mr. Grinstein) First of all, what system  
19 is this document discussing?

20 A. I believe this is DFP, DART for Publishers.

21 Q. And what does this document tell you about the  
22 kind of access that DFA or advertisers had into the DFP  
23 system?

24 A. If --

25 THE WITNESS: Well, Matt, if you could

1 blow up the lower left corner where that person is  
2 sitting there.

3 A. That's an advertiser, and you can see from the  
4 three arrows that are -- you go up and to the right,  
5 that there are three things that the advertiser can do.  
6 They can view an insertion order. That says, I think,  
7 how their ads are going to be showed one after the  
8 other -- shown one after the other.

9 They can view a placement, which has to do  
10 with where would they like their ad to go. And they can  
11 do reports on how much money do they owe, who looked at  
12 their ad.

13 There's no place there where an advertiser can  
14 enter their advertisement. That was done by the  
15 publisher having rounded up the ads from the  
16 advertisers.

17 Q. Does this chart -- chart show advertisers  
18 having the ability to input information to create?

19 A. No.

20 Q. Does this chart show advertisers having the  
21 ability to input information to select?

22 A. No. All they can do is look at stuff. It  
23 doesn't show them being able to enter anything in this  
24 figure.

25 Q. Okay. Let's talk about DFA for a second,

1 Dr. Rhyne.

2 A. All right.

3 Q. Can you tell us what DFA was?

4 A. Well, it's sort of the polar opposite of DFP.  
5 It was intended for an advertiser who created some  
6 advertisements just like they wanted them and went  
7 around and rounded up a bunch of publishers and said I  
8 will pay you money if you'll put my ad on your website.  
9 And the DoubleClick system helped those advertisers  
10 rotate those ads among those various publishers.

11 MR. GRINSTEIN: I'd like to put up  
12 Defendant's Demonstrative DX271.

13 Q. (By Mr. Grinstein) And, Dr. Rhyne, was this a  
14 demonstrative that you saw Mr. Lanning discuss?

15 A. Yes.

16 Q. And what does this demonstrative tell you  
17 about the nature of the DFA system?

18 A. Well, first off, that chart of capabilities  
19 and all, this is essentially describing, I think, an  
20 object, it's called. It has certain characteristics.  
21 It's from a DFA manual.

22 And you can see that down at the lower right,  
23 there's an advertiser with a terminal. That -- that, in  
24 a sense, is some kind of an interface to what they  
25 labeled as a computer controller. But notice that the

1 publisher is just hanging out.

2           And -- and like I said, DFP doesn't have an  
3 input interface for the advertiser. This one, DFA,  
4 doesn't have an input interface for the publisher.

5           Q.    Okay. Now, you mentioned that there was a  
6 second reason why, in your opinion, DoubleClick didn't  
7 meet the limitations of the claims or the second main  
8 reason, at least.

9           A.    Yeah.

10          Q.    What was that again?

11          A.    They don't meet that pub -- that processing  
12 requirement. There's nothing that is -- as I found in  
13 any of the documents or the testimony about the  
14 DoubleClick capabilities in these two systems that says  
15 that that -- what has been labeled here computer  
16 controller -- ever automatically modifies the ad as  
17 entered by the advertiser to make it match  
18 publication -- excuse me -- presentation rules that have  
19 been entered by the publisher.

20                The ads come in as they are, and they are  
21 presented on websites, but they're not made to conform  
22 to the requirements of the publisher.

23                       MR. GRINSTEIN: Can we see Defendant's  
24 Demonstrative DX276? DX Demo 276?

25           Q.    (By Mr. Grinstein) And, Dr. Rhyne, is this



1 the -- one of the charts that Mr. Lanning put up when he  
2 was discussing this processing element of DoubleClick?

3 A. If I understood it correctly -- in fact, I  
4 think this is the only chart that he showed relative to  
5 his -- his belief that the DoubleClick system  
6 demonstrated the ability to meet this processing and  
7 publishing. This dealt with the processing requirement,  
8 I believe.

9 Q. Okay. And can you just sort of explain what  
10 the argument that's being made here is, as you  
11 understand it?

12 A. As I understood it, based on the words on this  
13 piece of a page, Mr. Lanning found that there was some  
14 way that the publisher could affect the characteristics  
15 of the ad. But to my understanding of this same  
16 writing, that's not disclosed here.

17 Q. Have you seen any evidence from your review of  
18 the DoubleClick documents that affirmatively say  
19 presentation rules are not -- you know, are not promoted  
20 by the system?

21 A. I have, but can I -- I think this is kind of  
22 important to understand. So may I go a little bit  
23 further?

24 Q. Sure. Explain yourself further, Dr. Rhyne.

25 A. Okay. I read this and you can see in yellow,

1 as it was highlighted, there's something called a frame  
2 header and a frame footer. If you think about it from  
3 the publisher's point of view, they write software,  
4 probably this html language, to describe how they want  
5 their page to look.

6           You've seen the CNN or the cheese.com. The  
7 cheese.com had that big picture of cheese, and it had  
8 some menus and things. The CNN has the CNN logo and  
9 some news.

10           At some point in that code, you come to this  
11 frame header, and what that says is, hey, stop putting  
12 my stuff up, but this is where I want you to show an ad.  
13 It's like the beginning alert. It's like a left  
14 parentheses, okay? It says ad here.

15           And the advertisement will be defined by the  
16 advertiser in html, and it will live in between that  
17 frame header and the frame footer.

18           And there's nothing on this page that says  
19 anything about changing the html for the ad that will  
20 live between the footer and the header. And that -- I  
21 just don't see anything there that says that it was  
22 automatically made to comply.

23       Q.   And have you seen any documents in this case  
24 which suggest that, in fact, advertiser rules trumped  
25 publisher rules in a DoubleClick system?

1           A.     I have.

2           Q.     I'd like you to turn to Defendant's  
3 Exhibit 370, and we're specifically going to 4061.

4                   MR. GRINSTEIN:   And, Matt, if you can  
5 blow up the highlighted --

6           Q.     (By Mr. Grinstein) Dr. Rhyne, how does that  
7 particular sentence impact your opinion about the  
8 DoubleClick system?

9           A.     It makes clear that as disclosed in this  
10 manual, there is no capability for the publisher's rules  
11 to over -- override the advertiser's rules.  In fact, it  
12 says:  Note that the value specified in an ad  
13 placement -- that's the ad that the advertiser  
14 created -- overrides the value specified in the site  
15 properties, which would be the value associated with  
16 what the publisher said.

17                   So it says advertisers trump publishers.

18                   MR. GRINSTEIN:   And, Matt, I'm sorry, but  
19 could you put up the definition of processing again,  
20 which I think was original Rhyne Demo 55?

21           Q.     (By Mr. Grinstein) And, Dr. Rhyne, while we're  
22 putting up the definition of processing, can you explain  
23 why it's relevant to anticipation that in the  
24 DoubleClick system advertiser -- advertiser's rules  
25 overrode publisher's rules?

1           A.     It's because, as the Court had construed that  
2 last requirement for processing the electronic  
3 advertisement, it says it must make that advertisement  
4 comply with the presentation rules of the internet media  
5 venues, not with the sellers.

6                     Okay. That was the big shift. That all of a  
7 sudden, instead of the advertisers being in control of  
8 the ads, this system says we're going to make the  
9 publishers be in control of the ads.

10                    And that's -- that's just exactly opposite to  
11 what that section of the DoubleClick manual teaches.

12           Q.     Dr. Rhyne, let's turn to the AdForce  
13 reference.

14           A.     All right.

15           Q.     On the basis of your study, Dr. Rhyne, does  
16 AdForce anticipate or render obvious the claims of the  
17 Function Media patents?

18           A.     Again, Mr. Lanning and I have come to an  
19 opposite conclusion based on our studies, and I don't  
20 believe that it does.

21           Q.     Now, did you hear Mr. Lanning testify that he  
22 believed that AdForce allowed for the custom --  
23 automatic customization of ads based on publisher  
24 presentation rules?

25           A.     I did.

1 Q. Do you agree with that?

2 A. No.

3 Q. Why not?

4 A. There's nothing in the document about AdForce,  
5 that -- what -- User Guide 2.6, that ever shows anything  
6 that clearly and convincingly describes having something  
7 that the publisher wants to see on the advertisement  
8 override what the advertiser said the ad should look  
9 like.

10 Q. I want to show you Defendant's Exhibit 403.

11 A. Okay.

12 Q. That's the User Guide 2.6?

13 A. It is.

14 Q. And if you can turn to Page 6-22, which is for  
15 the record, G005527.

16 A. Okay.

17 Q. And is there anything on this particular  
18 page --

19 MR. GRINSTEIN: Matt, can you blow up --

20 THE WITNESS: Yeah, I think it's probably  
21 best if we look at that whole top half.

22 Q. (By Mr. Grinstein) Okay. Is there anything on  
23 this page which informs your opinion about whether or  
24 not presentation rules in the AdForce system affected  
25 impact of formatted advertising content?

1           A.     Part of what -- there's sort of a link between  
2 this and another document, but just to remind the jury,  
3 this is headed creatives, and creatives are a term in  
4 the art for advertisements. It's what the advertiser  
5 has created.

6                     And it says in the second paragraph: The  
7 AdForce software is automated to receive advertisements  
8 from advertisers and deliver them to websites. That's  
9 what it was for. It doesn't say anything there about  
10 changing them.

11                    It says that the submitted advertisements must  
12 already have been tested, debugged, and functioning. So  
13 the advertisers submit ads to this system, the AdForce  
14 system, that are ready to go, okay?

15                    In fact, it says in the next paragraph: The  
16 submitted advertisements must be entirely correct and  
17 follow AdForce service's rich media ad guidelines or  
18 campaign delivery may be delayed. And they reference  
19 you to this guidelines for creating and submitting  
20 creatives, technical document, to see more about what  
21 those guidelines are.

22           Q.     Let's look at that document, actually. I  
23 think that's Defendant's Exhibit 405.

24                    And is -- is that the guidelines for creating  
25 document that -- that you just mentioned?

1           A.     It has the same name, and I have operated  
2 under the assumption that although there wasn't anything  
3 very -- more specific than the title, that this is that  
4 document.

5           Q.     All right. And what kind of formatting  
6 instructions does this document disclose that AdForce  
7 advertisers could include with their advertisements?

8           A.     A couple of times, but primarily html, at  
9 least for what we've been interested in.

10          Q.     And does it disclose that advertisers could  
11 affect colors or borders or fonts or anything like that?

12          A.     I think, in fact, there was a question asked  
13 of one of the AdForce witnesses, does it ever disclose  
14 colors. And I think this is the -- the particular prior  
15 reference where there was no disclosure of color.

16                 There is a mention of frame border in one of  
17 the examples, but I think -- I think -- I have yet -- I  
18 haven't seen anything about color in this particular  
19 document.

20          Q.     Actually, Dr. Rhyne, I think you might be  
21 talking about a different document.

22          A.     Oh, okay.

23                     MR. GRINSTEIN: Can we turn to 8122,  
24 Matt?

25          A.     All right.

1 Q. (By Mr. Grinstein) And remember, this is the  
2 advertiser creatives document, Dr. Rhyne?

3 A. I do.

4 Q. And what does 8122 tell advertisers they can  
5 include with their ads?

6 A. All right. I may have that wrong.

7 Okay. It says that in your ad as an  
8 advertiser, you can put border. Okay, you can -- oh,  
9 that's right. It has font color.

10 It says that you can do font, size, and color,  
11 but this is in the advertiser's input as to how the  
12 advertiser creates their ad in html.

13 Q. Now, did you hear Mr. Lanning and Mr. Scheele  
14 mention that in the AdForce system publishers could  
15 include background color?

16 A. Yes.

17 Q. I'm going to ask you some questions about how  
18 publishers could include background color.

19 A. Okay.

20 Q. We'll talk about how the system processed it  
21 later, but I want to first talk about how exactly they  
22 could provide that background color.

23 And so I want to ask you about Defendant's  
24 Exhibit 404.

25 A. Okay.



1 Q. This is document you reviewed, correct?

2 A. Yes. Yes, it is. Uh-huh.

3 Q. And if you could turn to Page 5740.

4 A. I have it.

5 Q. What does this document indicate to you about  
6 the manner in which publishers could provide background  
7 color to the AdForce system?

8 A. Well, I think the bottom part of this from the  
9 header background, BG color was shown during  
10 Mr. Lanning's presentation. And it says that background  
11 color is a six-digit code used to indicate what  
12 background color is to be used for the I-frame tag. So  
13 what this is telling you is that you -- as a publisher,  
14 can specify a background color for this whole -- this  
15 I-frame that you're going to -- leave in your web page.

16 And -- and it's -- it's what will be behind  
17 the advertisement. That's why it's called a background  
18 color.

19 Q. Does that page indicate to you that AdForce  
20 had an interface that prompted?

21 A. No. This is something that you have to type  
22 in yourself in a word processor, and then having typed  
23 it in, you would cut and paste it and in some way put it  
24 into the html description of your own as a publisher web  
25 page.

1           Q.    Now, do you have an opinion as to whether or  
2 not the AdForce system used that background color and  
3 processed it to make ads comply with the background  
4 color?

5           A.    I'm kind of two minds here.  And the first  
6 point is that there's nothing in that description that  
7 tells me anything about what's going to happen  
8 downstream with those BG colors equals black, or  
9 whatever FFF7D6 is.

10                   There's -- there's some passable parameters,  
11 they're called, that appear after some question marks in  
12 four rows.  It's my understanding that what they're  
13 basically doing is saying, at this time, some people use  
14 Internet Explorer as their browser; some people use  
15 Netscape as their browser.  And this is how you would  
16 write an ad to make it possibly pass a background color  
17 out to those.

18                   But there's really nothing in any of the  
19 disclosure.  I haven't seen any software or any further  
20 information as to what's going to be there.  So my first  
21 point is I don't see anything.

22                   And my second point is that if those  
23 background colors that are highlighted here are passed  
24 as the background color of the I-frame, then, as I just  
25 said, that's going to get covered up by the -- the

1 advertisements. It's not going to be used to change any  
2 characteristic of the advertisement entered by the  
3 advertiser.

4 Q. Well, then why would publishers have the  
5 option to include background color?

6 A. Well, because it's possible at least with this  
7 system that the advertisements didn't appear. And they  
8 would not necessarily want to have a beautifully  
9 formatted web page and then have a section of it that's  
10 just left white or -- or, you know, some -- whatever  
11 color might be there as the default color in their  
12 browser.

13 They would like to have their web page still  
14 look nice, even if the advertisements don't show up.

15 Q. Okay. And let me ask you about another  
16 difference between AdForce and the Function Media  
17 patents.

18 Did AdForce disclose a seller interface?

19 A. No.

20 Q. Let me show you --

21 MR. GRINSTEIN: Let's go to Defendant's  
22 Exhibit 403. And I want to look at Page 5479, please,  
23 Matt.

24 Q. (By Mr. Grinstein) Dr. Rhyne, how does this  
25 impact your opinion about whether or not AdForce had a

1 seller interface?

2 A. Well, I looked at the permission profile  
3 that's set in the bottom. And as I understand that,  
4 this is something that the IT manager for AdForce as a  
5 company --

6 MR. VERHOEVEN: Objection. Beyond the  
7 scope of the report, Your Honor.

8 (Bench conference.)

9 MR. GRINSTEIN: He discusses the lack of  
10 the seller interface in his report, and he discusses the  
11 fact that it's not disclosed in this document.

12 MR. VERHOEVEN: It's not in his report.  
13 About half of what he's testified to has not been in his  
14 report, Your Honor. And this one is also not in his  
15 report.

16 MR. GRINSTEIN: I mean, his report  
17 says that --

18 MR. VERHOEVEN: It's not in his report.  
19 In his deposition, he didn't rely on this either.

20 THE COURT: Well --

21 MR. VERHOEVEN: Do you dispute that?

22 MR. GRINSTEIN: Yeah. He talks about the  
23 fact that the AdForce -- I don't have the report with  
24 me.

25 MR. VERHOEVEN: He testified in his

1 deposition that he --

2 MR. GRINSTEIN: Your Honor, I'll move on.

3 THE COURT: I'm not going to -- I'm  
4 accepting your representation that this is discussed in  
5 his report, okay? And that the line of testimony that  
6 you're going to elicit is discussed in his report.

7 That's your representation.

8 MR. GRINSTEIN: I'm going to move on,  
9 Your Honor. I believe that's true. But if I'm  
10 mistaken -- I don't want to make a mistake, so I'm going  
11 to move on.

12 (Bench conference concluded.)

13 Q. (By Mr. Grinstein) Dr. Rhyne, I want to talk  
14 to the issue of obviousness. When you look at  
15 obviousness, what point of view do you use?

16 A. You use the point of view of someone that's  
17 this hypothetical person of ordinary skill in the art.

18 Q. And did you hear Mr. Lanning provide a  
19 definition of ordinary skill in the art?

20 A. I did.

21 Q. What's your opinion about his definition of  
22 the ordinary skill?

23 A. I thought it was inordinately high. I think  
24 basically he looked at a person who had a number of  
25 years of experience, had a bachelor's degree, and had

1 indepth experience with a variety of internet-related  
2 tools, like website development tools, a variety of  
3 description language -- descriptive languages, like html  
4 and others, and even had indepth experience with the  
5 network protocols that are used to transmit data over  
6 the internet.

7           And it seemed to me that he basically was  
8 almost --

9           MR. VERHOEVEN: I'm sorry. I object.  
10 This is not in his report.

11           (Bench conference.)

12           MR. GRINSTEIN: Your Honor, the level of  
13 ordinary skill in the art is absolutely in his report.

14           MR. VERHOEVEN: But he never took issue  
15 with Mr. Lanning, and now he's taking issue the very  
16 first time. We've never heard the reasons why he  
17 disagrees.

18           MR. GRINSTEIN: They have two competing  
19 ordinary skill definitions. Of course, he can talk  
20 about why he likes his better than Mr. Lanning's.  
21 They're two competing ordinary skill definitions.

22           THE COURT: Is there one that he put  
23 forth in his report different?

24           MR. GRINSTEIN: Yes, it's different  
25 from -- it's different from the one Mr. Lanning put

1 forth.

2 THE COURT: All right. I'm going to  
3 overrule the objection.

4 (Bench conference concluded.)

5 Q. (By Mr. Grinstein) Dr. Rhyne, again, can you  
6 explain what your view is of Mr. Lanning's ordinary  
7 skill definition?

8 A. Well, to put it simply, I think it's unusually  
9 high, particularly in requiring such an extensive amount  
10 of industrial experience with areas of technology on the  
11 internet that aren't in any way impacting on the claims  
12 of the Function Media patents.

13 Q. Now, Dr. Rhyne, based on Mr. Lanning's  
14 definition of ordinary skill, did you hear him testify  
15 that he thought the Function Media inventions were  
16 obvious?

17 A. That's correct, he did.

18 Q. Do you agree?

19 A. No.

20 Q. Why not?

21 A. Well, even at his high level of ordinary  
22 skill, I think that there's evidence that I've seen that  
23 would support exactly the opposite, that this -- this  
24 using obviousness to fill holes in the references is --  
25 is -- is inappropriate.

1           Q.    Have you seen documents, evidence you  
2 discussed in your report that suggests that the prior  
3 art was going in a different direction?

4           A.    I've looked at documents that I cite  
5 deposition testimony and other things that said that at  
6 this time, at the time before the Function Media patent  
7 hit the street, that -- that the advertising world was  
8 advertiser-centric.

9                    Okay.   That the person of -- you have this  
10 pair between the seller and the publisher.   That it was  
11 the advertiser who set the looks and feels of their ads;  
12 that it was important to them to do so; and that no  
13 people thought they wouldn't -- they would never give  
14 up, as an advertiser, the right to look -- to set the  
15 way their advertisement was going to look and have some  
16 other system automatically change its -- its appearance  
17 to make it happy for the publisher; that the advertiser  
18 wanted it to make them happy, not the publisher happy.

19          Q.    Now, did you hear Mr. Lanning mention a  
20 reference known as NetGravity?

21          A.    Yes.

22          Q.    Does NetGravity alone render the claims  
23 obvious?

24          A.    No.

25          Q.    Why not?



1           A.     Well, primarily in simple terms, it doesn't  
2 teach automatic processing to make an advertisement  
3 modify -- match the presentation rules of the publisher.  
4 And also it doesn't have a seller interface.

5           It's aimed at publishers who rounded up ads,  
6 got fully defined ads from a bunch of advertisers, put  
7 them in their system, and NetGravity put those ads on a  
8 variety of publisher sites.

9 Q. So just so we're clear, did NetGravity have an  
10 internet media venue interface?

11           A.    I don't think it had an interface for internet  
12 media venues that prompted the internet media venue to  
13 input presentation rules.  It didn't meet that  
14 particular limitation.

15 Q. What about a seller interface?

16 A. It didn't have a seller interface at all.

17 Q. Did it process ads to make them compliant with  
18 publisher rules?

19 | A. No.

20 Q. Let's take a look at the NetGravity User  
21 Guide, Defendant's Exhibit 422. You've discussed that  
22 in your report obviously.

23 | A. Yes.

24 | Q. And I want to look at Page 17187.

25 | MR. GRINSTEIN: It's the next one, 17187,

1 please.

2 A. Okay.

3 Q. (By Mr. Grinstein) Now, you heard Mr. Lanning  
4 discuss setting an ad style as being relevant to the  
5 publisher presentation rule limitation in the patents?

6 A. Yes.

7 Q. And there's discussion down at the bottom of  
8 this document about ad styles and NetGravity.

9 Do you see that?

10 A. Yes.

11 Q. What's your opinion about whether or not those  
12 qualify as presentation rules that NetGravity made  
13 advertisements comply with?

14 A. Well, the presentation rules are supposed to  
15 be the thing that comes into play during the processing  
16 step where you make the ad compliant. And these are  
17 really placement -- positioning rules on the website.  
18 These say do I want the ad in the middle of the page; do  
19 I want it in the upper left; or do I want it on the  
20 right margin or the left margin?

21 But none of them, as I read them, change the  
22 characteristics of the ad at all. It just tells you  
23 where you're going to place it on the -- on the  
24 publisher's page, not how the ad is going to look.

25 Q. If you had a style that said put a horizontal

1 line above and below an ad, does that process the ad to  
2 make it comply with anything?

3 A. No. It processes the page on which the ad is  
4 going to appear, but putting a line above it or below it  
5 as part of the publisher's page doesn't change the ad at  
6 all. In fact, if there weren't an ad, you'd see those  
7 two lines.

8 Q. So you've discussed what NetGravity doesn't  
9 have.

10 Is it your opinion that NetGravity renders the  
11 claims obvious?

12 A. No.

13 Q. What about the document that Mr. Lanning  
14 discussed where a NetGravity founder had said he was  
15 thinking about adding a seller interface? Does that  
16 render the claims obvious?

17 A. No. The point there, I guess first off, is he  
18 didn't do it. Okay. He said, well, our advertisers  
19 have to submit their ads to us by e-mail. They have to  
20 mail us a little disk. They have to drive to our office  
21 and hand it to us.

22 First off, that shows you what I've said all  
23 along, that the advertisers were in control of the ads.  
24 They brought them to the NetGravity people and said  
25 here's my ad; put it on somebody's website.

1           But to -- what I read that quote as saying is  
2 that the advertisers would like a more automatic way to  
3 be able to submit their ads, maybe by sending them in in  
4 some way other than having to e-mail them to us. Maybe  
5 we could reach out and get them every day from them.  
6 But I didn't see anything there that implied that it  
7 would be a seller interface that would prompt the seller  
8 to input information to select or information to create.

9           Q.     And just to conclude NetGravity, do you  
10 believe that NetGravity, in combination with either  
11 DoubleClick or AdForce, renders the claims obvious?

12          A.     No. And I've got a simple reason for that.  
13 While there were differences as to what each of them did  
14 or didn't disclose, none of those three references  
15 discloses this processing to make the ad comply with the  
16 publication rules of a publisher.

17                 And it's kind of like if you had three pieces  
18 of paper and I punched holes in them that indicated  
19 where the missing parts of the claim was, if you hold  
20 all three pieces of paper one on top of the other, if  
21 there's a hole that's at the same place for all of them,  
22 you'll just see right through it.

23                 As far as that last limitation, that (f), none  
24 of them meet that limitation. So if you put them  
25 together and say, well, hey, in combination they teach

1 something, they never teach that.

2 Q. I want to talk to you about another topic  
3 relating to obviousness, and this is called secondary  
4 considerations of non-obviousness.

5 Can you just, you know, summarize what that  
6 means?

7 A. Right. You know, the other day I slipped into  
8 legalese and referred to a Markman construction, and  
9 Judge Everingham was kind enough to explain what that  
10 meant.

11 As I understand it, the secondary  
12 considerations are something that have come out of some  
13 prior legal cases, and they are things that can be  
14 identified that push against the idea that something is  
15 obvious.

16 They're factors -- you heard the two economic  
17 experts talk about the Georgia-Pacific Factors. Well,  
18 the secondary considerations are factors that if they're  
19 in evidence, they -- they argue against or support  
20 against the idea that something is just obvious.

21 Q. Is there a factor relating to commercial  
22 success?

23 A. There is.

24 Q. And can you explain how, in your opinion, that  
25 factor impacts your obviousness opinion?

1           A.     Sure.

2                     MR. VERHOEVEN:  Objection, Your Honor.

3                     May I approach?

4                     THE COURT:  Yes.

5                     (Bench conference.)

6                     MR. VERHOEVEN:  In his report, there is  
7 absolutely no nexus between -- there's no point to the  
8 commercial success of the Google products.  And in his  
9 report, there's absolutely no nexus between that as  
10 required by law.

11                    You can't just point to the fact that the  
12 accused product is successful and say that that's  
13 commercial success.

14                    THE COURT:  Well, I'm going to hear his  
15 opinion.  And I think the record will allow the jury to  
16 find a nexus.  So I think there's sufficient evidence in  
17 the record.  So I'm going to overrule the objection.

18                    (Bench conference concluded.)

19            Q.     (By Mr. Grinstein) Dr. Rhyne, to repeat my  
20 question again, what's your opinion about commercial  
21 success and how it relates to obviousness in this case?

22            A.     As I understand, the reason that commercial  
23 success is one of the secondary -- and something that's  
24 called indicia or factors ought to argue against  
25 obviousness is that if somebody has an idea and they are

1 very successful financially, it implies that their idea  
2 must be kind of unique among all of the marketplace,  
3 because if it was obvious, then all their competitors  
4 would be doing it, and -- and there wouldn't be an  
5 opportunity to make that kind of profitability out of  
6 that idea.

7 Q. And what do you see here with respect to that?

8 A. Well, first off, it's my opinion, as I  
9 explained a week ago, that the AdSense for Content and  
10 AdSense for Mobile services processes offered by Google  
11 infringe the Function Media patents.

12 Because of that, I believe that those patents  
13 are fundamental to the success that that Ad -- that  
14 Google has made financially and -- and in the  
15 marketplace, their penetration in the marketplace  
16 through use of those patents.

17 And, certainly, I -- I saw all kinds of big  
18 numbers that were produced during this case and  
19 discussed by the economics experts that show that  
20 Google's use of those patents has been commercially  
21 successful.

22 Q. Is there another one of these considerations  
23 known as long-felt need?

24 A. Yes.

25 Q. Can you explain that and how it impacts your

1 opinions in this case?

2       A.    The way it relates to being -- showing that  
3 something is not obvious is, if there were a lot of  
4 people working in and around that field at the time of  
5 the invention, and none of them, no one else came  
6 upon -- even though they wanted to be successful in that  
7 field, they never came upon that particular idea.

8               They knew that it was something good; they  
9 wanted it to be successful; but they just never found  
10 that particular solution.

11       Q.    And how do you see that present in this case?

12       A.    Well, with that AdForce, with a bunch of  
13 really smart people; we've got DoubleClick working with  
14 DFP and DFA, working with publishers and advertisers;  
15 we've got Netscape -- I knew I would say it --  
16 NetGravity.

17               All of those people are out there working in  
18 and around, trying to be financially successful in the  
19 advertising on the internet field, and I have yet to see  
20 amongst anything those people did prior to the year 2000  
21 when the Function Media patents came out, that somebody  
22 else came up with the idea of turning the -- the game  
23 around.

24               And instead of having the advertisers say: I  
25 want my ads to look just like I want them to look, going



1 over to the other end and saying: No. You submit your  
2 ads, and you'll get the benefit of going to lots and  
3 lots of places, but you have to give up control of the  
4 look and feel of your ad and let the publisher modify it  
5 automatically to make it comply with their view, and --  
6 and nobody else did that.

7 Q. And the last factor I want to talk to you  
8 about is praise. Can you explain that and briefly see  
9 what evidence you saw of it in this case?

10 A. Sure.

11 If -- if the industry looks to something and  
12 says -- if other people in the industry say, you know,  
13 that's a good idea; that's been very successful, things  
14 I've seen in the past or maybe where an invention won a  
15 national or international award -- and in my expert  
16 report, I cited to some newspaper and other types of  
17 articles that were on the internet about AdSense for  
18 Content and specifically said that this was a really  
19 sharp and good system, and also some of the users of the  
20 system have praised its ability to help them sell their  
21 products.

22 MR. GRINSTEIN: Your Honor, may I  
23 approach?

24 (Bench conference.)

25 MR. GRINSTEIN: Your Honor, the next

1 topic I want to get into is his rebuttal on  
2 noninfringing alternatives.

3           If you recall, during his direct  
4 testimony, I wanted to discuss -- sort of pre-rebut that  
5 issue, and you said, let's see what comes in and let him  
6 discuss it, if it's appropriate, in his rebuttal.

7           So I don't want to get into this topic  
8 without warning anybody about it, but --

9           THE COURT: No. It's -- it's -- what I  
10 told them at the bench, I believe, earlier was to wait  
11 and let's hear what they said about it. I mean, I don't  
12 remember that exact bench conference, we've had so many,  
13 but --

14           MR. VERHOEVEN: My expert did not -- on  
15 direct did not testify about noninfringing alternatives.

16           MR. GRINSTEIN: Well, I've got about --

17           MR. VERHOEVEN: So there's nothing to  
18 rebut from Mr. Lanning.

19           MR. GRINSTEIN: Sorry.

20           MR. VERHOEVEN: -- that was not a subject  
21 that I talked about.

22           MR. GRINSTEIN: I mean, their -- I'm  
23 sorry.

24           MR. VERHOEVEN: Sorry. I'll let you know  
25 when I'm done.

1 I talked about noninfringement and  
2 invalidity. I did not ask him questions about  
3 noninfringing alternatives, and therefore, there's  
4 nothing to rebut.

5 THE COURT: Well, it's his rebuttal case,  
6 though. I mean, it's his rebuttal expert, but it's a  
7 rebuttal case, and I mean, it came out in your  
8 case-in-chief, correct, noninfringing alternatives?

9 MR. VERHOEVEN: It did.

10 THE COURT: Starting with --

11 MR. VERHOEVEN: We had Google witnesses  
12 talking about that, Your Honor. But maybe I  
13 misunderstood something. I thought that the rebuttal  
14 that they were talking about was that they would rebut  
15 on the issue of validity. Noninfringing alternatives is  
16 a damage -- a damages doctrine.

17 THE COURT: Well, I'm overruling the  
18 objection.

19 But, Counsel, you've got all of about  
20 12 -- 13 minutes left.

21 MR. GRINSTEIN: Six questions, Your  
22 Honor.

23 (Bench conference concluded.)

24 Q. (By Mr. Grinstein) Dr. Rhyne, finally, I want  
25 to ask you a question about design-arounds and

1 noninfringing alternatives.

2 Have you heard testimony in this trial about a  
3 product called Explorer that Google has been discussing?

4 A. Not a product. I've heard about a project  
5 that's been under internal testing and maybe even some  
6 limited external testing at Google called Explorer.

7 MR. VERHOEVEN: I apologize, Your Honor.

8 May I approach one more time? And then  
9 I'll be done.

10 THE COURT: Yes.

11 MR. VERHOEVEN: I'm sorry.

12 (Bench conference.)

13 MR. VERHOEVEN: Just for the record, this  
14 discussion that he's going to present about Explorer  
15 also is not in his report, and it's not in any of his  
16 deposition, Your Honor. We raised it, and it was not  
17 responded to.

18 MR. GRINSTEIN: Your Honor --

19 MR. VERHOEVEN: As part of the Rule 26  
20 process, they're supposed to --

21 THE COURT: No. I understand.

22 MR. GRINSTEIN: Your Honor, the -- his  
23 report says that he did not see the existence of any  
24 noninfringing alternative. This is an argument they've  
25 come up with at trial based on a document, an e-mail

1 that they produced two weeks ago showing this Explorer  
2 issue.

3 And this is the exact argument that we  
4 had before Your Honor, which was that we were being  
5 prejudiced, because they weren't producing any documents  
6 on Explorer and then coming in here and offering  
7 testimony on it.

8 And we were not able to go look at the  
9 source code; we were not able to do any of these things.

10 So at the very least, we should be able  
11 to put up a witness who can respond.

12 MR. VERHOEVEN: Quick response, Your  
13 Honor.

14 I'm being told that the Explorer  
15 noninfringing alternative was in Mr. Lanning's Rule 26  
16 report. There was an opportunity for that to be  
17 addressed. The point of these reports is so people  
18 aren't surprised, and this was not in.

19 THE COURT: Here's what I'm going to do.  
20 I allowed your witnesses to testify about it to the  
21 extent that it was disclosed in documents that came in  
22 very late in this case, okay? And I allowed them to get  
23 into that based on documents over y'all's -- over their  
24 objection.

25 I'm going to similarly allow him to rebut

1 it based on documents that are in the record where you  
2 can point to the absence of things, that he hasn't seen  
3 documents, okay? But he's not going to get into  
4 document production. But restrict him to what was used  
5 at trial.

6 MR. GRINSTEIN: Yes, Your Honor.

7 THE COURT: Overruled.

8 (Bench conference.)

9 Q. (By Mr. Grinstein) What is your understanding  
10 of this Explorer project as it was discussed at trial?

11 A. It's my understanding that what Google is  
12 investigating is the possibility of having -- instead of  
13 having the advertisers submit keywords that identify --  
14 like we talked about, baseball caps or something, that  
15 they say, I would like my advertisement to show up on  
16 websites that focused on baseball or sports, that the --  
17 Google would use software to analyze the words of the ad  
18 itself, okay?

19 And I think it probably, as best I know, only  
20 works with text ads, and they would look at the words of  
21 the text that were entered by the advertiser and say,  
22 based on reading your words, we think some good keywords  
23 for you would be whatever it's going to be.

24 But they would -- they would -- they would  
25 supply the keywords for the advertiser instead of the

1 advertiser supplying the keyword.

2 Q. Is that alternative noninfringing?

3 MR. VERHOEVEN: Objection, Your Honor,  
4 beyond the scope.

5 THE COURT: Overruled.

6 A. I don't think it is. When I heard about it  
7 recently, I thought about it, and -- and, basically, in  
8 that case, I think the words of the ad themselves, after  
9 they've been processed by Google, become keywords,  
10 become the kind of information to select websites so  
11 that what the advertiser would enter is both in the same  
12 set of words, information to create an ad and  
13 information to select where they would like that ad to  
14 go.

15 And the example I would give you is, if I have  
16 an advertisement that -- we saw one, bass fishing, okay?  
17 Well, if -- if I say bass fish -- Fred's Bass Fishing  
18 Service; we'll -- we'll -- we're excellent guides; we'll  
19 supply the tackle; here's our return address, when you  
20 analyze those words, what are you going to find?

21 Bass, fishing, tackle, lessons. Those are the  
22 same words that you would expect the advertiser to have  
23 suggested. And if you get the same words out of the  
24 content of the ad, those keywords were taken by  
25 information that was entered by the advertisers.

1           So I don't see that as being a noninfringing  
2 alternative. It's an alternative, but I believe that  
3 that would infringe as well.

4           Q.     (By Mr. Grinstein) Have you seen any evidence  
5 discussed in this trial or heard any testimony in this  
6 case that that Explorer would somehow work better than  
7 the current system?

8           A.     I don't recall any -- there was some  
9 discussion that some limited set of advertisers were  
10 using it, but I didn't hear any factual data to imply  
11 that it was more superior than to give the advertiser  
12 the right to specify where they wanted their ad to go.

13          Q.     Do you think it would work better?

14          A.     I -- if I'm an advertiser -- a good example  
15 would be, suppose I said -- well, we've seen it. Joe's  
16 Guitars. Well, Joe is a word for coffee, you know, and  
17 I don't think I would want my guitar ad to be  
18 misinterpreted to be on a Starbucks website.

19          Q.     Does this noninfringing alternative that  
20 Google has discussed in any way change your opinion  
21 about whether these patents are new, important,  
22 fundamental?

23          A.     No. Based on all my study and all that I've  
24 heard, both in depositions and at trial, I don't -- my  
25 opinion remains that the patents are infringed and



1 valid.

2 MR. GRINSTEIN: No further questions.

3 THE COURT: Cross-examination.

4 MR. VERHOEVEN: Very briefly, Your Honor.

5 THE COURT: Yes, sir.

6 MR. VERHOEVEN: May I approach and move  
7 out the easel?

8 THE COURT: Of course, yes.

9 MR. VERHOEVEN: Can I get some help,  
10 please?

11 Can everyone see that okay?

12 Your Honor, is it okay if I stand out  
13 here, so I can point at this?

14 THE COURT: Yes, sir.

15 MR. VERHOEVEN: Thank you.

16 CROSS-EXAMINATION

17 BY MR. VERHOEVEN:

18 Q. Mr. Rhyne, I'll be very brief. I just want to  
19 ask you a couple of questions about this noninfringing  
20 alternative subject matter --

21 A. All right.

22 Q. -- Explorer.

23 A. Yes.

24 Q. You understand that the testimony was that  
25 Google has a system; it's in beta form; it's available

1 that they could use called Explorer, right?

2 A. I don't know what you mean by available, but  
3 it is in beta test form. I heard that.

4 Q. Okay. And the Explorer system would not allow  
5 an advertiser to ask to be placed on particular  
6 websites, correct?

7 A. It would not allow the -- I don't know about  
8 allow, but it was designed to replace having the  
9 advertiser send in keywords.

10 Q. The advertiser couldn't put in the placement  
11 field that we looked at before and say: I want to be  
12 on -- my ad to be on www.fishing.com, right?

13 A. I have no opinion on that, because I don't  
14 remember whether there was testimony about placement --  
15 placement or not. I focused on keywords.

16 Q. Well, do you recall one way or the other?

17 A. I don't recall whether that was testified to  
18 in Court.

19 Q. You're not aware of any evidence that the user  
20 with Explorer could ask for a specific website, are you?

21 A. I'm not aware of any evidence either way.

22 Q. And you're aware that with Explorer, the  
23 advertiser couldn't even put in keywords saying, I'd  
24 like to be associated with these subjects, right?

25 A. It's my understanding that they wouldn't --

1 would be -- the keywords would be generated  
2 automatically by the -- by Google.

3 Q. The advertiser could not put in keywords,  
4 could it, sir, that would say, I want to be associated  
5 with these keywords using Explorer, correct? Yes or no.

6 A. I don't know whether they would -- that  
7 feature was completely turned off or not.

8 Q. You don't know.

9 A. I don't know.

10 Q. Did you hear testimony that it was?

11 A. I don't remember if there was testimony that  
12 it was completely turned off.

13 Q. Now, with the Explorer system, all the  
14 advertiser can do is put in the headline and the  
15 advertisement and the link, right, sir?

16 A. Yeah, that's my understanding.

17 Q. Okay. And it's your testimony to this jury,  
18 that that functionality meets this second interface of  
19 the computer system through which the seller is prompted  
20 to input information to select one or more of the  
21 internet media venues.

22 Is that your testimony to this jury?

23 A. As I understand Explorer, yes, that's my  
24 testimony.

25 Q. Okay. What if they just put a headline and no

1 description of an ad? Would that meet that?

2 A. If there was a word in the headline, yes, it  
3 would -- that could be used as a keyword, it would.

4 Q. Okay. So if I'm an advertiser; I don't ask  
5 for any keywords; I don't ask for any websites; I just  
6 say headline is fishing --

7 A. Okay.

8 Q. -- it's your testimony that the seller has  
9 input information to select one or more of the internet  
10 media venues.

11 Is that your testimony to this jury?

12 A. As I understand the way Explorer works, yes,  
13 sir.

14 Q. Okay.

15 MR. VERHOEVEN: That's all I have, Your  
16 Honor.

17 THE COURT: Okay.

18 MR. GRINSTEIN: No further questions.

19 THE COURT: Okay. You may step down.

20 THE WITNESS: Thank you.

21 THE COURT: Who will be your next  
22 witness?

23 MR. GRINSTEIN: Your Honor --

24 MR. NELSON: May we approach, Your Honor?

25 THE COURT: Yes.

1 (Bench conference.)

2 MR. NELSON: Before evidence closes,  
3 there's an open issue about Plaintiff's Exhibit 157,  
4 which is the U.S. Today article about Ms. Wojcicki.  
5 Multiple witnesses have testified that this was posted  
6 within Google. Ms. Wojcicki herself has testified, I  
7 believe, about this. We'd like to move to admit this  
8 document.

9 THE COURT: Okay. Is there an objection?

10 MR. VERHOEVEN: Has he even talked about  
11 this?

12 MR. NELSON: Yes.

13 MR. DEFRANCO: Are you going to use it --  
14 I don't understand.

15 MR. NELSON: No. We just want to make  
16 sure we -- we've actually referenced it, so we just want  
17 to make sure it's in evidence.

18 MR. DEFRANCO: If that's all they're  
19 using it for, that's fine, Your Honor.

20 We're not going to hear about something  
21 in closing that hasn't been presented on this article?

22 MR. NELSON: Just to be clear, we are  
23 going to talk about this, but it has been presented to  
24 the jury.

25 MR. DEFRANCO: Well, there's all sorts

1 of hearsay information --

2 MR. NELSON: It is a quote from  
3 Ms. Wojcicki. Sorry.

4 THE COURT: Don't talk over.  
5 Make your objection.

6 MR. DEFRANCO: Your Honor, there was  
7 testimony at deposition about what she said or didn't  
8 say about this. For them to come in now and quote this  
9 as fact and truthful statements when it's a reporter's  
10 recapping of an interview with Ms. Wojcicki, I don't  
11 think that's appropriate.

12 THE COURT: I'm overruling the objection.  
13 It's admitted.

14 MR. NELSON: And one -- just one  
15 logistical -- I want to make sure for the record -- I  
16 don't think they object -- PX1700, I'm not sure we were  
17 on the record as that having been admitted. I don't  
18 think there's an objection, but I'm --

19 THE COURT: What is it?

20 MR. NELSON: It's -- it's a document that  
21 was admitted from the Sergey Brin deposition, and we  
22 gave it to you -- I'm almost positive it's already been  
23 preadmitted, but before the evidence closes, I just want  
24 to make sure it's in the record.

25 THE COURT: Well, can I -- well, are you

1 getting ready to rest in front of the jury?

2 MR. NELSON: Yes, sir.

3 THE COURT: Okay. I'm -- I'm going to  
4 leave the -- leave the record open for the limited  
5 purpose of PX1700. Y'all talk about it. If y'all have  
6 an objection to it, I'll hear it, you know. If not,  
7 I'll just go ahead and I'll rule on the objection --

8 MR. DEFRANCO: Yes, sir.

9 THE COURT: -- once the jury has --

10 MR. DEFRANCO: Okay.

11 MR. VERHOEVEN: Since we're here, after  
12 they close, remember, I told you I was going to call  
13 Mr. Lanning to rebut? That will be real quick.

14 THE COURT: Okay. I'm sorry?

15 MR. VERHOEVEN: Remember yesterday when  
16 we were -- I was doing the direct of Mr. Lanning, and I  
17 asked you if I would be able to have him be called after  
18 Mr -- Mr. Rhyne, so we'll be calling him for just 15, 20  
19 minutes.

20 THE COURT: Okay.

21 MR. GRINSTEIN: Your Honor, this is going  
22 to be -- I'm not quite sure I understand the purpose of  
23 the testimony.

24 My understanding is, if he came up with  
25 something new, he could call Mr. Lanning and rebut, but

1 Mr. Lanning has already had a say on validity. They  
2 don't get two -- like we can't call Dr. Rhyne and argue  
3 infringement again.

4 MR. VERHOEVEN: I specifically addressed  
5 this with Your Honor yesterday --

6 MR. GRINSTEIN: Well, I understand.

7 MR. VERHOEVEN: -- and you said I could  
8 call him, and they agreed.

9 And I probably said I didn't know what he  
10 was going to testify about. It might be less than what  
11 you had. But I'd like to have him address Dr. Rhyne's  
12 arguments afterwards, and Your Honor said I could do  
13 that, and he agreed that I could do that.

14 MR. GRINSTEIN: I agreed that there could  
15 be a rebuttal, but I didn't agree as to the scope of the  
16 rebuttal.

17 THE COURT: Well, folks, come on. I'm  
18 going to allow him to call him. Let's get the evidence  
19 in. You've got a time limit. If you need to call Rhyne  
20 back to rebut something he says, but we're going to play  
21 under the same rules. This is unorthodox, to say the  
22 least.

23 Let's go.

24 (Bench conference concluded.)

25 MR. TRIBBLE: Your Honor, Plaintiff



1 rests.

2 THE COURT: Okay. Ladies and Gentlemen,  
3 you've now heard the Plaintiff's rebuttal evidence. I  
4 was advised at the bench that we had a limited amount of  
5 surrebuttal testimony as well.

6 So Mr. Verhoeven?

7 MR. VERHOEVEN: Thank you, Your Honor.

8 Defense calls Mr. Lanning.

9 Proceed, Your Honor?

10 THE COURT: Please.

11 MARK LANNING, DEFENDANT'S WITNESS, PREVIOUSLY SWORN

12 DIRECT EXAMINATION

13 BY MR. VERHOEVEN:

14 Q. Morning, Mr. Lanning.

15 A. Good morning.

16 Q. Now, you were sitting in the courtroom for Dr.  
17 Rhyne's testimony, correct?

18 A. Yes, I was.

19 Q. I'd like to start by asking you a couple  
20 questions about AdForce.

21 Did you -- were you here in the courtroom  
22 today when Dr. Rhyne testified that AdForce did not have  
23 a seller interface?

24 A. Yes, sir.

25 Q. Can you tell the jury whether you agree with

1 that opinion?

2 A. I don't agree with that opinion. And I  
3 understand now that you've heard two opposing opinions  
4 from Dr. Rhyne and myself about whether the AdForce  
5 system had an advertiser interface, and I believe it  
6 does, and I believe the AdForce user manual clearly  
7 shows that it does.

8 Q. Okay.

9 MR. VERHOEVEN: Can we go to DX demo 223,  
10 please.

11 Q. (By Mr. Verhoeven) Can you explain to the jury  
12 what we're looking at here?

13 And before I -- before you answer that, just  
14 for the record, this is a screen shot of Exhibit DX 403  
15 in evidence, Page 5469.

16 The question is: Can you explain to the jury  
17 what we're looking at here?

18 A. Yes. This is a page from the AdForce user  
19 guide, this manual, like we looked at yesterday in  
20 detail, and I've blown up a section of this document  
21 which says: Advertising allows users to create, copy,  
22 and modify campaigns.

23 And as has been discussed multiple times, as  
24 well as I have explained, a campaign is creating an ad,  
25 deciding where you want that ad to be displayed, and

1 when you want to start sending that ad out and when you  
2 want to stop it.

3 Q. Okay.

4 MR. VERHOEVEN: Can we go to DX 403,  
5 5509.

6 And can you highlight that, please,  
7 Charles?

8 Q. (By Mr. Verhoeven) Mr. Lanning, can you  
9 explain to the jury what we're looking at here?

10 A. Yes. This is another page from the AdForce  
11 user guide, which a new advertiser is being added to the  
12 AdForce system. If we look at the very top of the  
13 screen shot from the AdForce menu, the text says: Ad a  
14 new advertiser.

15 Now, what's occurring here is that the system  
16 administrator for AdForce or a super-user, as they refer  
17 to, is adding information for a new advertiser. And  
18 they provide the log-in name that's highlighted there,  
19 the password that's at the second slot, and they confirm  
20 the password, which is the same.

21 And this is showing very clearly that an  
22 advertiser is being given a log-in interface so that  
23 they can have a second interface.

24 Q. Okay.

25 MR. VERHOEVEN: Let's go to DX 224.

1 And for the record, this is Exhibit DX 403 in evidence,  
2 Page 5481.

3 Q. (By Mr. Verhoeven) Mr. Lanning, is this from  
4 the user manual as well?

5 A. Yes, it is.

6 Q. It's this document here?

7 A. Yes. Again, it's another page.

8 Q. Can you explain to the jury how this relates  
9 to your opinion?

10 A. This -- the way the AdForce system worked is  
11 that you could provide permissions or capabilities for  
12 different users in the system and define what they were  
13 capable of doing on this AdForce system.

14 This is explaining, as highlighted by the --  
15 the words that I've highlighted in the bottom sentence,  
16 that network administrators can assign any permission to  
17 any user. And what that effectively says is that an  
18 advertiser can perform any function that's defined by  
19 this manual if the network administrator decides that  
20 that's appropriate.

21 So regardless of where it's shown in the  
22 manual or what's done, the network administrator can.  
23 And there's one part that I'd also like -- and when you  
24 determine which of our opinions that you decide that  
25 you're going to agree with, Dr. Rhyne's or myself, I'd

1 like you to ask yourself, if you look -- what I need to  
2 explain in the AdForce user guide, the AdForce user  
3 guide has a whole chapter for advertisers.

4           It starts on Page 6-1, which has a production  
5 number G005506. This page --

6           THE WITNESS: I don't know if you can  
7 pull it up or not, Charles.

8           A. Right at the top, we can see it says  
9 advertising. Now we have it on the screen.

10           If we look at the outline of what's in this  
11 whole Chapter 6, there's 107 pages that have been  
12 included in this manual for advertisers.

13           And I'd like you to ask yourself, if AdForce  
14 didn't have an ad -- advertiser interface, why would the  
15 AdForce user manual have 107 pages describing all the  
16 functionality that could be performed by a user or the  
17 seller in this case?

18           It also has a chapter that's a different  
19 chapter, Chapter 7, for publishers, which defines all  
20 the publisher capabilities.

21           I just showed you how an advertiser is added,  
22 so they can use all of the capabilities that are listed  
23 in chapter 6, as well as capabilities in the rest of the  
24 manual if the network administrator gives them the  
25 permission to do so.

1           Q.     Now, Mr. -- or Dr. Rhyne testified, with  
2 respect to AdForce, that under the AdForce system, the  
3 media venues presentation rules would not have any  
4 control.

5                     Do you agree with that?

6           A.     No, absolutely not.

7           Q.     And can you explain to the jury why you  
8 disagree with that.

9           A.     Because the whole design of the AdForce system  
10 is designed -- is -- there are two different pieces of  
11 information, among others, but the two key pieces of  
12 information is an advertiser defines an ad, and then a  
13 publisher defines what they refer to in the AdForce user  
14 guide as a content unit, which is the area for the ad  
15 and the presentation rules for that ad.

16                     And it's clear to me that the AdForce user  
17 guide, it's -- there's some real simple examples. If I,  
18 as a publisher, define a content unit with a green  
19 background color and the ad is text, this -- the AdForce  
20 system is clearly going to apply the green background  
21 color for the ad, as I defined for the publisher, and as  
22 I described in detail yesterday of how different  
23 presentation rules are applied to give different  
24 backgrounds, to give frame borders and other  
25 characteristics.

1           Q.    Mr. Lanning, I'd like to switch now to the  
2 subject of the DoubleClick DART system, which was  
3 another system that you testified on direct that you  
4 believed anticipates, right?

5           A.    Yes, that's correct.

6           Q.    And you heard Dr. -- Dr. Rhyne's testimony  
7 about DoubleClick, correct?

8           A.    Yes, I did.

9           Q.    Did you hear his testimony that he did not  
10 believe DoubleClick was an integrated system?

11          A.    Yes, I did.

12          Q.    Do you agree with that opinion?

13          A.    No, I do not.

14          Q.    Can you explain to the jury why?

15          A.    Again, we have two different opinions, and you  
16 have to decide which one you agree with, with Dr. Rhyne  
17 and myself.

18                If we think about the DART DoubleClick system,  
19 it has two modules that Dr. Rhyne described, the DFA,  
20 which is DART for Advertisers, and DFP, which is DART  
21 for Publishers.

22                The AdForce system, as I just showed you,  
23 decided to include both modules in the same document.  
24 They had 107 pages for the advertiser interface, and  
25 they had a Chapter 7, I believe, that has 37 pages for

1 the publisher.

2           The DoubleClick system, instead of publishing  
3 it all in one user guide, this software was going out to  
4 different types of users. So they split the software or  
5 the manuals up for the software into two pieces.

6           If it was an advertiser, they would send the  
7 DART for Advertiser documentation and product out to the  
8 advertiser. If the person was a publisher, they would  
9 get the DFP manuals.

10           The only reason they're saying that -- in my  
11 mind, that the systems are different is because they're  
12 published in two different manuals, but they still  
13 depend on the same system to publish ads based on the  
14 presentation rules that are defined by the publishers.

15           Q. Now, did you hear some testimony from  
16 witnesses that were involved with DoubleClick in this  
17 case?

18           A. Yes, I did.

19           Q. And did that help inform your opinion?

20           A. Yes. It supported my opinion. It was my  
21 opinion, reading the documentation in the first place,  
22 that this is the way the system worked.

23           Q. And what -- what portions of the testimony do  
24 you believe supports your opinion that you've heard?

25           A. Both Ms. Delfau and Mr. Rupp that you listened



1 to the other day -- the days have kind of blended  
2 together for me, maybe you, too, but both of the people  
3 that actually worked on the DART DoubleClick system  
4 explained that if you pulled the plug on the back-end  
5 part of the system, both the DFA and DFP functionality  
6 would not work.

7           Now, I also heard that Dr. Rhyne said, well,  
8 that's just some other functionality, and that's not  
9 what really should be considered. That's not that  
10 important.

11           Well, it is very important, because if you  
12 have a DART for Advertiser interface, and an advertiser  
13 is trying to select the websites that they want to  
14 select and put their ad on that -- be displayed on, if  
15 the DART back-end system is down, they can't display all  
16 of the different websites that are available on the  
17 system.

18           So it's very important to understand that the  
19 overall system for DART and the controller was necessary  
20 for both DFA and DFP to operate.

21           MR. VERHOEVEN: Charles, can we put up  
22 the January 22, 2010, transcript of Mr. Rupp, Page 49,  
23 Line 6, through 50, Line 1?

24           You want me to say that again?

25           Your Honor, may I, quickly?

1 THE COURT: Uh-huh.

2 Q. (By Mr. Verhoeven) Take a second, Mr. Lanning,  
3 and look at this testimony.

4 A. (Complies.)

5 MR. VERHOEVEN: Let's go to the -- leave  
6 it at the top, please, Charles.

7 Q. (By Mr. Verhoeven) Is this some of the  
8 testimony you're referring to?

9 A. Yes, it is.

10 Q. And can you explain to me why this testimony  
11 confirms your opinion?

12 A. The first part is describing, as we see,  
13 about -- gives us a sentence about DFA, which is the  
14 DART for Advertisers.

15 The answer is: DFA is a product for online  
16 advertisers.

17 And I won't read all of that answer, but  
18 that's describing -- and then it -- and then it goes  
19 on -- I should have included the next sentence.  
20 It allows them, meaning the advertisers, to create  
21 online campaigns, run them on various websites, collect  
22 all the information into a central place, and run  
23 reports on it.

24 And then the question was: And DFP? And so  
25 that was asked.

1           Answer: DFP is a product for online  
2 publishers websites. It allows them to manage ad  
3 campaigns and control which ads show on their websites.

4           Question: And did they both use DART, meaning  
5 did both DFA and DFP both use the overall DART system?

6           The answer to this was clearly: Yes. They  
7 were both built out of the DART technology, meaning it  
8 was the overall system.

9           Question: And did they work together in that  
10 sense?

11          Answer: Absolutely.

12          Question: Could you give us a few sentences  
13 on that?

14          And then the answer is: First of all, they  
15 shared almost all their technology. So they had a  
16 common AdServer, a common back-end data processing  
17 system, that part that I worked on. There was a common  
18 database. Most of the UI, which means the interface,  
19 and reporting code was shared between the two systems.

20          Now, this is much more than just a few  
21 components. Look at this. There are the ads, the  
22 common database, the AdServer. The AdServer is what  
23 sends the ads out to websites.

24          This isn't just some supplemental software and  
25 hardware that wasn't needed. These are very key

1 components in the overall DART system for both DFA and  
2 DFP.

3 Q. So you believe it is an integrated system?

4 A. Yes, definitely.

5 Q. Now, finally, you've heard Dr. Rhyne say, with  
6 respect to DoubleClick, as well as AdForce, that  
7 DoubleClick, they didn't have the capability that the  
8 media venues presentation rules would control.

9 Did you hear that testimony?

10 A. Yes. I think they referred to that the ad  
11 would trump or override the publisher presentation  
12 rules.

13 Q. Do you agree with that opinion?

14 A. No, absolutely not.

15 Q. And can you explain to the jury why not?

16 A. Yes. Because one of the key components that's  
17 provided -- if we look at the advertiser -- if we look  
18 at the publisher system, if we look at Page 730 -- I  
19 went through this very fast, and there was a lot of  
20 information on the page, which has a publication number  
21 G005643.

22 It's the one menu that you look at that looks  
23 like a foreign language to you, because it has a lot of  
24 different information on it.

25 THE WITNESS: Charles, do you think

1 you'll be able to find that?

2 A. But this page -- I'll talk a little bit about  
3 the page while they're finding it. I'm taking them by  
4 surprise a little bit, I guess, moving around.

5 But this is a page that's created by the  
6 AdForce system. And if I go in -- and as explained by  
7 at the AdForce manual, I go in as a publisher, and I  
8 answer the questions to the different menu choices about  
9 my content unit, which means where I want my ad to be,  
10 and the characteristics for the presentation rules --

11 THE WITNESS: If we can blow up the  
12 bottom portion of that, the bottom menu, please.

13 A. I think as soon as you see it, you'll remember  
14 this slide. Right.

15 There's not very many whole words on here.  
16 Everything looks somewhat cryptic. I didn't explain, I  
17 don't think, in detail. Without getting into a little  
18 bit of detail, this is information that is provided to  
19 the publisher. It's a screen menu, and if you look down  
20 on the bottom left, it says save.

21 So this is provided to the publisher that  
22 says, this is our understanding, meaning the AdForce  
23 system creates this -- this is our understanding of what  
24 the publisher is asking for. Do you want to change  
25 anything?

1           And the one thing that I showed is prompting  
2 the publisher to change their preferences, is down in  
3 the middle of the slide that says frame border.

4           THE WITNESS: Charles, can you find that?  
5 Yes. Go straight to the right from the cursor.

6           A. Frame border equals zero. If I want a frame  
7 border on my ad, you may recall that I said, all I need  
8 to do as a publisher is change that zero to a one and  
9 then push the save button, and those preferences are  
10 saved.

11           So this is definitely prompting the publisher.  
12 As a matter of fact, that's the beauty of the AdForce  
13 system is, it gives a publisher a lot of different  
14 preferences.

15           And if that ad were entered, then this frame  
16 border would have -- if I change it to a one, my ad  
17 would have a frame border around it, regardless of what  
18 the advertisement...

19           So the presentation rules are applied by the  
20 AdForce system. They're not trumped or overridden by  
21 the ad.

22           Q. Thank you, Mr. Lanning.

23           MR. VERHOEVEN: Nothing further.

24           THE COURT: Cross-examination.

25                           CROSS-EXAMINATION

1 BY MR. GRINSTEIN:

2 Q. Mr. Lanning, I want to start with DoubleClick  
3 first.

4 You just testified that in your opinion, the  
5 DoubleClick system processed ads such that it would  
6 apply presentation rules from publishers.

7 Was that just your testimony?

8 A. Yes, that was.

9 Q. But the document you just showed was from  
10 AdForce, right?

11 A. I -- I believe that -- well, the document -- I  
12 don't know how to answer your question. There were  
13 documents and -- I don't know.

14 Q. In fact, you only showed one document in your  
15 rebuttal -- or surrebuttal testimony about the issue of  
16 processing, and it was that AdForce screen shot we just  
17 looked at, right?

18 A. When you say "surrebuttal testimony," are you  
19 referring to what I'm doing right now?

20 Q. Right now.

21 A. I only showed one document, and that's the  
22 AdForce document.

23 Q. You didn't show any DoubleClick documents, did  
24 you?

25 A. Not in this testimony, no.

1           Q.    And you did not explain away the document that  
2 Dr. Rhyne cited in his testimony and the fact that I  
3 cross-examined you about, that said: Ad placements  
4 override site properties.

5                   Did you explain that away in your surrebuttal  
6 testimony?

7           A.    Yes, I believe I did.

8           Q.    Did you address that document specifically in  
9 your surrebuttal testimony?

10          A.    No. In the interest of time, I did not.

11          Q.    Mr. Lanning, I want to talk to you about your  
12 opinion that DFP and DFA were integrated.

13                   You did not cite any documents in your  
14 surrebuttal testimony about this alleged integration,  
15 did you?

16          A.    No, I did not.

17          Q.    You cited to the testimony of Ms. Delfau,  
18 correct?

19          A.    I don't believe that was Ms. Delfau. I think  
20 that could have been Mr. Rupps.

21          Q.    Well, you just -- in your surrebuttal  
22 testimony, you discussed the testimony of both  
23 Ms. Delfau and Mr. Rupp, didn't you?

24          A.    I described and paraphrased the testimony, and  
25 then we read the testimony of one of them, yes.



1 Q. Both of them work for Google; is that correct?

2 A. That's my understanding, yes.

3 Q. And the Judge is about to instruct the jury  
4 about the nature of disinterested witnesses and  
5 corroboration.

6 Mr. Lanning, did those two witnesses, who work  
7 for Google, qualify as disinterested witnesses?

8 A. That's sounds like a legal term to me, but I  
9 believe they were accurate, as supported by the AdForce  
10 user guide and the DART documentation.

11 Q. Let me ask you some questions about AdForce.  
12 You said that AdForce applied publisher presentation  
13 rules, and you showed that screen shot that we just put  
14 up and discussed, correct?

15 A. That's correct. Well, wait a minute. I don't  
16 understand which screen. Maybe I can help. It was -- I  
17 remember the page. Was it 7-30 of the AdForce user  
18 guide? Is that the one?

19 Q. I believe that's the one we were just looking  
20 at.

21 A. Okay.

22 Q. Did -- anywhere on that page did it say that  
23 AdForce would apply presentation rules from publishers  
24 to override advertiser's rules?

25 A. It did to me, and it would to one of ordinary

1 skill in the art, yes.

2 THE COURT: Well --

3 Q. (By Mr. Grinstein) Tell me the words on that  
4 page that said: AdForce will apply publisher background  
5 color and will override an advertiser background color.  
6 I want to hear the words that were on the page.

7 A. Okay. That's a different question. Those  
8 words are not on the page.

9 Q. And, in fact, those words don't appear in any  
10 AdForce documentation; isn't that correct?

11 A. Those specific words do not appear in the  
12 AdForce document.

13 Q. There's not a single word in any of the  
14 AdForce documents that you have reviewed that tells the  
15 users of the AdForce system that AdForce will override  
16 advertiser rules and apply publisher rules instead;  
17 isn't that correct?

18 A. That -- those specific words, the way you  
19 phrased them, are not in the AdForce user guide, that's  
20 correct.

21 MR. GRINSTEIN: Thank you.

22 THE COURT: Anything further?

23 MR. VERHOEVEN: Nothing further, Your  
24 Honor.

25 THE COURT: Okay. Step down.

1                   MR. VERHOEVEN: We have no further  
2 evidence to present, Your Honor.

3                   THE COURT: You close? You rest?

4                   MR. VERHOEVEN: We rest.

5                   THE COURT: Okay. The Plaintiff close,  
6 subject to the housekeeping matter we discussed at  
7 bench?

8                   MR. TRIBBLE: Plaintiff closes, Your  
9 Honor.

10                  THE COURT: Defendant close?

11                  MR. VERHOEVEN: Defendant closes, Your  
12 Honor.

13                  THE COURT: Okay. Ladies and Gentlemen,  
14 you've now heard all the evidence that you're going to  
15 hear in the case. I'm going to break you at this time.

16                  Be back ready to come into the courtroom  
17 to begin final arguments at -- well, we've got a couple  
18 of housekeeping matters to take care of during your  
19 break, so we'll start at 10:00 o'clock with the final  
20 arguments.

21                  Each party -- just for purposes of our  
22 schedule, each party has 45 minutes in which to present  
23 their final arguments, and I think it will take  
24 somewhere -- take me somewhere between 30 and 40 minutes  
25 to read the Court's charge to you.

1                   So once -- once we come back in at 10:00  
2 o'clock, we'll go until after I've concluded reading the  
3 Court's charge to you, and then the case will be in your  
4 hands for deliberations, okay?

5                   Remember my prior instructions. Don't  
6 talk about the case.

7                   COURT SECURITY OFFICER: All rise.

8                   (Jury out.)

9                   THE COURT: All right. Y'all have a  
10 seat.

11                  I told you last -- yesterday, rather, at  
12 the charge conference, that I'd take formal objections  
13 to the Court's charge. I believe my clerk transmitted a  
14 most recent version of it to you last night.

15                  Let's hear from the Plaintiff your  
16 objections to the Court's jury instructions.

17                  MR. NELSON: Your Honor, we have four  
18 proposed instructions to add.

19                  THE COURT: Okay.

20                  MR. NELSON: And should I read them, or  
21 should I proffer them?

22                  THE COURT: You can proffer them to me.

23                  MR. NELSON: I'll do it all at once.

24                  THE COURT: Okay. Do you have a copy  
25 for --

1 MR. NELSON: Yes, sir.

2 THE COURT: -- counsel?

3 MR. NELSON: The first, Your Honor, is --  
4 and should I go to the podium?

5 THE COURT: Yes.

6 MR. NELSON: The first is an instruction  
7 regarding Google's own patents and that it's not a  
8 defense to patent infringement. Evidence has come in  
9 about Google's patents, and given the fact that it's  
10 come in as black letter law, that it's not a defense to  
11 patent infringement, and we would request this  
12 instruction be added.

13 THE COURT: Okay. What's the next one?

14 MR. NELSON: The second is that evidence  
15 has come in regarding a noninfringing alternative. This  
16 is, I believe, an instruction that is directly out of  
17 case law -- or is it out of a model jury instruction?

18 MR. BURNS: Case law.

19 MR. NELSON: It's directly out of case  
20 law regarding noninfringing alternative, and we would  
21 request, because the evidence had come in, this be added  
22 regarding the noninfringing alternative. We cited the  
23 case law right below it, Your Honor.

24 The third instruction is -- first of all,  
25 Your Honor has given an instruction with respect to

1 Section 271(a), and this is an alternative construction.

2 MR. BURNS: That's right.

3 MR. NELSON: This is our alternative  
4 construction to that on the top, Your Honor, under  
5 271(a), regardless of that issue -- and we understand  
6 Your Honor already has a proposed construction in that.

7 Regardless of that issue, there is a  
8 separate instruction on the bottom that is not addressed  
9 in -- in the jury instructions right now, and one of our  
10 arguments is just straight out of the patent law, which  
11 is made, use, or sell, has occurred in the United States  
12 or offered to sell has occurred in the United States.

13 And so we would request that the bottom  
14 instruction be added, regardless of the -- the ruling on  
15 the 271(a) point.

16 And lastly, Your Honor, we have an  
17 instruction regarding our AdForce inference. We can get  
18 that into more detail, if you want, but briefly, we  
19 believe that under any standard, certainly, the  
20 bad-faith standard, we -- we've shown that here.  
21 Certainly, with respect to patent law and damages and  
22 design-around, which we don't have any of these  
23 documents, we believe that it's -- that that doesn't  
24 even apply, but even with that higher standard, it  
25 should apply.

1                   You know, we have met that standard,  
2 given what Google has done, especially with Ms.  
3 Wojcicki, who as you know, did not produce documents,  
4 came in much later and is now at trial. We were  
5 substantially prejudiced in being able to cross-examine  
6 her, given -- given the destruction of her documents.  
7 So with those, Your Honor, those would be our additions  
8 and changes to the -- to the -- proposed changes to the  
9 jury instructions.

10                   THE COURT: Okay. Let's hear -- is there  
11 any objection to the offer-to-sell instruction,  
12 including that?

13                   I've given the one that -- or I have  
14 crafted an instruction and included it in the --

15                   MS. CANDIDO: Yes.

16                   THE COURT: -- charge that was tendered  
17 to y'all last night that was based out of -- on the  
18 Research in Motion case.

19                   My question to you is, do you have any  
20 objection to the one they proposed for offers to sell  
21 from a legal standpoint?

22                   MS. CANDIDO: No, we don't, Your Honor.

23                   THE COURT: Okay.

24                   MS. CANDIDO: And we believe Your Honor's  
25 instruction on the international sales is appropriate.

1 THE COURT: Okay. Well, you had it as a  
2 three-prong test, and when I went back and looked at the  
3 case, it looked like there were two elements required  
4 to -- to prove where the system, as a whole, is put into  
5 service. That's why I rephrased it.

6                   So what I'm going to do is, I'm telling  
7 the Plaintiff, I'm going to give the instruction to the  
8 jury that -- leave the one in place that's in there with  
9 respect to the international sales, and I'm also going  
10 to add the one that relates to where an offer to sell  
11 occurs.

12 Do you have objection, in light of the  
13 testimony about -- it was not detailed, but there was  
14 testimony related to your own patents. Do you have an  
15 objection to -- a legal objection to the phrasing of the  
16 one that they've tendered to you?

17 MS. CANDIDO: I'll let Mr. DeFranco  
18 address that, but I would just note for the record that  
19 we had a conference yesterday, and the parties didn't --  
20 the Plaintiff didn't mention three of these four  
21 yesterday, so we're addressing them.

22 THE COURT: Well, okay. We had a  
23 conference, too, and I'm just trying to get -- trying to  
24 resolve it.

25 MR. DEF FRANCO: That's fine, Your Honor.



1 We don't have an objection legally to this instruction.  
2 I just want to note for the record that, you know, we're  
3 not conceding that this can be used to go into subject  
4 matter areas on closing that, obviously, the Court has  
5 prohibited, but as to -- as the legal instruction, we  
6 don't have an objection to this.

7 THE COURT: Okay. I'm going to include  
8 that under the instructions for infringement.

9 MR. NELSON: Thank you, Your Honor.

10 THE COURT: I am not giving a spoliation  
11 instruction, but I'm not denying the motion for  
12 sanctions either. I'm going to develop that record a  
13 little bit more than it's developed now, and I'll take  
14 that into account at the close of the evidence, as I  
15 know a little bit more about the change in corporate  
16 policy before I make any final rulings.

17 MR. NELSON: Okay.

18 THE COURT: So -- but I'm not going to  
19 give a spoliation instruction.

20 MR. NELSON: Oh, I'm sorry.

21 THE COURT: The last one is the  
22 noninfringing alternative instruction. What's the --

23 MR. DEFRANCO: Your Honor, I'm not as  
24 quick on my feet on this one. Could we just look at the  
25 case -- cases over the break and come back just

1 before --

2 THE COURT: Sure.

3 MR. DEFRANCO: -- and comment on this  
4 one?

5 THE COURT: Just let me know about a  
6 quarter till.

7 MR. DEFRANCO: Yes, Your Honor.

8 MS. CANDIDO: And the, Your Honor --

9 THE COURT: Hold on just a second.

10 MS. CANDIDO: Okay.

11 THE COURT: Did you have any additional  
12 objections to the Court's charge?

13 MR. NELSON: No, Your Honor.

14 THE COURT: How about to the verdict  
15 form?

16 MR. NELSON: No, Your Honor.

17 THE COURT: Okay. Now I'll hear the  
18 Defendant's objections to the Court's charge.

19 MS. CANDIDO: We do have one supplemental  
20 instruction I mentioned yesterday about the  
21 Georgia-Pacific factors that we'd like to have the Court  
22 replace the current instruction.

23 THE COURT: Okay.

24 MS. CANDIDO: In addition -- sorry.

25 In terms of objections, as I mentioned yesterday, we

1 object to the inclusion of the factors tending to show  
2 nonobviousness, except for the commercial success,  
3 long-felt need, and acceptance by others, because  
4 there's been no testimony offered on the other -- the  
5 other factors.

6 THE COURT: Okay. Any other objections?

7 MS. CANDIDO: Other than that, I do not  
8 think we have any other objections to the jury  
9 instructions.

10 THE COURT: Okay. I've endorsed as  
11 refused today the instruction you tendered up on the  
12 Georgia-Pacific factors.

13 I'm overruling the objection on the  
14 secondary consideration.

15 Objections to the verdict form?

16 MS. CANDIDO: I guess it's more of a  
17 request. With respect to the jury form, as we mentioned  
18 yesterday, we'd like to have a question oriented towards  
19 the U.S. versus international sales, in terms of  
20 infringement.

21 THE COURT: Okay. I'm going to over --  
22 decline that request. I'm going to submit it as I've  
23 tendered it to you.

24 I've given an instruction on what  
25 constitutes infringement and directing the jury that

1 they have to consider sales in the United States to  
2 determine infringement of the United States patent and  
3 then what they have to find in order to find  
4 infringement in the United States.

5 I'm going to overrule that request.

6 What kind of warnings do y'all want to --  
7 for your argument?

8 Well, are there any other objections or  
9 requests to the verdict form?

10 MS. CANDIDO: No, there aren't, Your  
11 Honor.

12 THE COURT: Okay.

13 MS. CANDIDO: Thank you.

14 THE COURT: All right.

15 MR. TRIBBLE: Your Honor, I was thinking  
16 I would go about 30 minutes and 15 minutes, and so I  
17 would think --

18 THE COURT: Let you know when you've used  
19 25?

20 MR. TRIBBLE: Yes, sir.

21 THE COURT: And five minutes left?

22 MR. TRIBBLE: Yes, sir.

23 THE COURT: You want a two-minute warning  
24 or anything towards the end?

25 MR. TRIBBLE: Sure.

1 THE COURT: I'll give you whatever  
2 warnings you want, but I just don't want to interrupt  
3 you more than you want me to.

4 MR. TRIBBLE: I understand. That's fine.

5 THE COURT: I'll tell you when you've  
6 used 25 in opening, when you have five minutes left in  
7 final arguments, and I'll give you -- I'll let you know  
8 when you have one minute remaining as well.

9 MR. TRIBBLE: Okay.

10 MR. VERHOEVEN: I'm assuming I'm doing  
11 the whole 45, right, Your Honor?

12 THE COURT: That's correct. Well --

13 MR. VERHOEVEN: You're not going to let  
14 me --

15 THE COURT: I'm assuming you're going to  
16 use all of your time.

17 MR. VERHOEVEN: Yes. And I'm not going  
18 to be permitted to get up after --

19 THE COURT: That's correct.

20 MR. VERHOEVEN: So I would like a warning  
21 at fifteen and two, if I may, Your Honor.

22 THE COURT: Okay. I'll let you know when  
23 you have fifteen minutes left and when you have two  
24 minutes left.

25 MR. VERHOEVEN: Thank you, Your Honor.

1                   THE COURT:   Okay.   Okay.   Court's in  
2 recess until 10:00 o'clock.

3                   Mr. DeFranco, if you'll let me know --  
4 take 10 minutes from now -- what your view is on the  
5 noninfringing alternative instruction.

6                   MR. DEFRANCO:   Yes, Your Honor.

7                   COURT SECURITY OFFICER:   All rise.

8                   (Recess.)

9                   COURT SECURITY OFFICER:   All rise.

10                  (Jury in.)

11                  THE COURT:   Please be seated.

12                  I'll hear closing arguments from the  
13 lawyers.

14                  Mr. Tribble, you may address the jury.

15                  MR. TRIBBLE:   Yes, Your Honor.

16                  Good morning.

17                  It's been two and a half years that this  
18 case has been pending.   It's been a long, hard road, but  
19 we're finally here.

20                  And as I told you at the beginning of  
21 this case, this is a case about property rights.   Only  
22 in this case, they're intellectual property rights that  
23 are duly issued in United States patents.

24                  But the case is also about fundamental  
25 notions of -- of things like our laws apply to everyone

1 equally, and everyone has to play by the rules, even a  
2 company like Google.

3           In a minute, the Judge will instruct you  
4 on the law, and the case will be in your hands. And  
5 you'll be instructed to weigh the evidence that you've  
6 heard. And just as I told you at the beginning of the  
7 case, in weighing that evidence, please consider what  
8 Google did and said back at the time, what they put in  
9 writing in their own documents internal, and what they  
10 were telling the world versus what they're saying now  
11 that there's a lawsuit, and the lawyers have gotten  
12 involved, and they have to take litigation positions in  
13 order to try to avoid a finding of infringement and  
14 validity and damages.

15           At the end of the day, applying the  
16 Court's law and weighing the evidence, I think you'll  
17 find that these patents are fundamental. They're core  
18 technology. They are of immense value to Google. They  
19 are valid. They are different than what had come  
20 before.

21           And as Google's own damages expert said,  
22 the issue is, what is the value of this technology to  
23 Google, the technology that has generated over \$5  
24 billion in revenues?

25           Now, I'm going to talk to you for about

1 30 minutes, and then I'll sit down, and then Google's  
2 attorney will talk to you for about 45 minutes, and then  
3 I'll get to stand up for about 15 minutes of rebuttal.

4           Here's what I'm going to talk about:  
5 Infringement, validity, and damages.

6           Let's talk about infringement. Remember,  
7 on the issue of infringement, we bear the burden of  
8 proof, but the Court will instruct you our burden is  
9 merely a preponderance of the evidence, more likely than  
10 not, just a slight tipping of the scale in our  
11 direction. And so as you're weighing the evidence, if  
12 it tips ever so slightly in favor of infringement, then  
13 you should find infringement.

14           In this case, we believe the evidence is  
15 overwhelming, and remember that if even one claim of a  
16 patent is infringed, then the patent is infringed. In  
17 this case, all eight of the claims that we were  
18 asserting in this suit have been shown to be infringed.

19           The Court will instruct you, though, that  
20 you must consider each of the patent claims separately.  
21 And pay attention to the Court's instructions. If you  
22 find that each and every limitation in a claim is  
23 present in the accused system, then that system acute --  
24 infringes that claim regardless of whether even if the  
25 accused products or their methods may be more or less



1 efficient or may contain additional features or  
2 functions not found in the claims.

3           There was a lot of testimony in this case  
4 about extra features. It's irrelevant. As long as the  
5 system has each and every one of these elements, the  
6 fact that they have something additional, it doesn't  
7 matter. It still infringes the claim.

8           In addition, it's no defense whether  
9 Google knew about the patents. If someone comes and  
10 drills an oil well on your property, they are  
11 responsible for paying you a reasonable royalty for the  
12 value of the oil that was generated, regardless of  
13 whether they knew it was your property at the time or  
14 not.

15           As -- there's been an issue made as to we  
16 didn't implement the invention. As Google's own expert  
17 admits, it's completely irrelevant. The only thing  
18 that's relevant is, did we conceive of the idea first?

19                   Did we file for a patent?

20                   Did we go through that long examination  
21 process?

22                   Did we receive a patent at the end of the  
23 day?

24                   And all the evidence shows that we did.  
25 It makes absolutely no difference whether Virtual Cities

1 Reservation site was the same or whether we implemented  
2 the invention or not.

3           Now, on this issue of additional  
4 elements, I believe the Judge will instruct you about  
5 comprising claims. The claims at issue in this case,  
6 they're written with the word comprising in the  
7 preamble. And what that means is you'll say a system  
8 comprising, and then you'll have a list of elements.

9           And the Judge will instruct you that a  
10 system will infringe that claim as long as it has each  
11 and every one of the specified elements, even if it has  
12 additional features.

13           But look at the example he gives. If the  
14 claim recites a table -- suppose you had a patent on a  
15 table. If it recites a table comprising a table top,  
16 legs, and glue -- here we have an example -- the claim  
17 will cover any table that contains those structures:  
18 Table top, legs, and glue, even if the table also  
19 contains other structures, such as a leaf or wheels on  
20 the leg.

21           And that's what we have here in the  
22 AdSense system. AdSense AdWords system has each and  
23 every one of our elements.

24           Does it have additional features, content  
25 targeting, auction process?

1                   Yes, it does. Those -- that's old  
2 technology they were doing years before the  
3 revolutionary idea of implementing what we patented.

4                   And it's just like this. Watch this.  
5 It's just like a leaf in the table: Content targeting  
6 and auction process, but at the end of the day, it's  
7 still a table with a table top, legs, and glue. And,  
8 therefore, it infringes.

9                   Now, the -- the only issue at the end of  
10 the day is whether Google's system falls within the  
11 scope of what's specified in each of our claims. And  
12 you have to consider them one by one.

13                   In this case, we've had some help.  
14 Dr. Rhyne, one of the most distinguished and recognized  
15 engineers, computer scientists in the United States, has  
16 come here and testified. He looked extensively at the  
17 Google system.

18                   And remember, he walked you in  
19 excruciating detail, claim element by element by  
20 element, every element of every claim that we're  
21 asserting in this case and showed you, through their own  
22 pictures, screen shots, demonstration of their own  
23 software, how each and every claim infringes -- is being  
24 infringed by the Google system.

25 | And remember, Jason Miller of Google. He

1 walked through a lot of screen shots, too. He agreed  
2 that the system operates exactly as Dr. Rhyne testified.  
3 He didn't get it wrong. He understands exactly how it  
4 works. And -- and, in fact, Mr. Miller even admitted  
5 certain elements that are in our patents are embodied in  
6 the Google system.

7                   Now, in response, there have been a lot  
8 of word games. There have been a lot of word games and  
9 confusing testimony elicited, but at the end of the day,  
10 Dr. Rhyne showed you the infringement.

11                   Google has three arguments still. One is  
12 that the seller doesn't implement an ad that's fully  
13 customized for each of the media venues. And, of  
14 course, the argument makes no sense, but they point to  
15 language saying, does the Google system enter an ad at  
16 all? And, of course, it does.

17                   If you had Coca-Cola, for example, trying  
18 to advertise using AdWords, it might enter in the ad  
19 Coco-Cola, have a Coke and a smile, whereas Pepsi might  
20 enter in Pepsi is the choice of a new generation.

21                   Each of those just entering in that text,  
22 that is a customized ad. It's customized according to  
23 the message that that advertiser wants to convey to the  
24 consumers. Coke wants to promote Coke; Pepsi wants to  
25 promote Pepsi. They've customized the ads for those

1 words.

2           It's like a classified ad. It doesn't  
3 have to have color and all the fancy formatting. That's  
4 what's done by the computer controller, the central  
5 system.

6           The seller interface up here, it's  
7 sufficient to just enter in customized text that sends  
8 your customized message. It would make no sense to  
9 customize it according to all of the different website's  
10 rules up here, and then do it again down here.

11           And, in fact, the Court has instructed us  
12 that publishing -- that processing requirement for the  
13 central controller, it processes the ads to make it  
14 comply with the website's rules. It doesn't say make  
15 sure it complies. It says make it comply.

16           And that's exactly what the AdSense  
17 system does. It's more word games coming from Google's  
18 litigation position.

19           Now, Google has a second argument.

20           Oh, by the way, speaking of word games,  
21 recall that the Google witnesses each testified that  
22 they had not read the patents, but, of course, when  
23 Ms. Wojcicki was on the stand, she answered questions  
24 from her lawyer, the Google lawyer, regarding  
25 presentation rules, a term in the patent.

1                   But, of course, when I asked her on  
2 cross-examination, she said she didn't understand what  
3 presentation rules were. It's more word games.

4                   And that's why you need to look at what  
5 they did and said at the time versus what they're saying  
6 in their litigation position today.

7                   Google's second argument is that Google  
8 does not place or make ads available at websites. Judge  
9 Everingham has instructed you on this. All that's  
10 required is that the ad be placed at -- placed or made  
11 available within the framework of the media.

12                  Here we're talking about the internet.  
13 The framework of the internet media is the web page.  
14 Media venues can be physical or virtual locations, and  
15 this has been beaten to death, so I'm not going to spend  
16 any more time on it, but, I mean, the documents are  
17 legion, okay, that -- they've even admitted on slip-ups  
18 on the stand Google is serving ads on a web page.

19                  And remember, they're serving it to that  
20 virtual location so that it is accessible by the end  
21 users, including viewers. It literally meant some  
22 physical location. For someone to view  
23 newyorktimes.com, I guess they would have to get on an  
24 airplane and fly to New York.

25                  It's word games. Their position doesn't

1 make any sense. You've seen dozens and dozens of Google  
2 documents saying they're serving websites, including  
3 their Securities and Exchange filing filed under oath.

4 Recall Ms. Wojcicki first testified one  
5 way on the stand, then changed it to the company line:  
6 No, no, we just -- it's the browser where the ad  
7 appears. But, of course, that's contrary to a sworn  
8 declaration she gave prior to this lawsuit.

9 Look at what they did and said at the  
10 time instead of what they're saying now to be consistent  
11 with their litigation position.

12 And still, Mr. Lanning -- and he's very  
13 likeable, but the Google lawyers had him parrot the  
14 company line: Google does not display ads on websites,  
15 despite all the evidence to the contrary.

16 Now, Google's third argument is it does  
17 not allow users to input information to select.

18 Dr. Rhyne explained to you it does it two  
19 ways: Through entering keywords and through direct  
20 placement. Two ways in the AdSense system.

21 Jason Miller confirmed this. Do you use  
22 keywords? Yes.

23 Is that information that's input used to  
24 select? Yes, it is.

25 It's the system that's doing the

1 selection. And, yes, there's an auction process that  
2 goes on, but is the information input? The keywords or  
3 the direct name, is it used in the selection process by  
4 the system? Yes, it is. Jason Miller confirms it.

5           Ms. Wojcicki testified that AdSense for  
6 Content was an old idea. This was to beef up their  
7 valid -- their invalidity argument saying, oh, this has  
8 been around a long time. But, in fact, their documents  
9 say that it was revolutionary and that it was new and  
10 that it was different than what had come before.

11           It was. It was different than everything  
12 other than our patented technology, which we invented in  
13 1998, and first disclosed to the Patent Office in  
14 January of 2000.

15           Mr. Verhoeven slipped up during opening  
16 argument, and even he said AdSense was an ingenious new  
17 technology, which is inconsistent with the idea that it  
18 was an old idea. And, in fact, this was confirmed by  
19 Google's Jeff Dean on the stand. He said he had never  
20 heard anyone discussing putting together a product that  
21 is like AdSense for Content before we did it.

22           Let's play a clip from Brian Axe.

23           (Video playing.)

24           QUESTION: I'll ask it again. Do you  
25 feel you can't answer the question yes or no, is there



1 an online interface for AdSense for Content?

2 ANSWER: If I define interface in the way  
3 that it --

4 (End of video clip.)

5 MR. TRIBBLE: I'll cut it off. That's  
6 the one where he paused for about two minutes. I asked  
7 him if there was an online interface, and, of course,  
8 Jason Miller admitted the document showed it. The  
9 system itself, Dr. Rhyne showed it to you. Of course,  
10 they had an interface.

11 He denied knowing what an interface was.  
12 It turned out later he was on a user interface committee  
13 at Google. It's just word games.

14 Here's the testimony of Angela Lai about  
15 websites.

16 (Video playing.)

17 QUESTION: So you're saying the answer to  
18 the question whether an ad by Google is displayed on a  
19 website depends on how one defines a website?

20 ANSWER: Yes, because that question means  
21 different things, if you ask it differently.

22 (End of video clip.)

23 MR. TRIBBLE: One of the largest internet  
24 companies in the world doesn't know what a website is.  
25 Word games.

1                   Now, let's talk about validity. The  
2 Court will instruct you, first of all, that just like  
3 infringement on validity, you have to go claim by claim.  
4 You have to look at each claim independently.

5                   Some of the claims are very narrow and  
6 some are broader. It could be possible that one claim  
7 is valid and another is invalid. Fortunately in this  
8 case, what we did is completely different than what came  
9 before, and all of our claims are valid.

10                  But the Court will instruct you that in  
11 order to be anticipated, that's one type of invalidity.  
12 For a patent claim to be anticipated by prior art, each  
13 and every limitation of the claim must be present. It's  
14 not enough that it's close. It kind of looks the same.  
15 You can't say, well, you can take a little bit of this  
16 product over here and a little bit over there and here,  
17 we'll get the third element from up here. You can't do  
18 that.

19                  For anticipation, you cannot find that  
20 the prior art anticipates a patent claim by combining  
21 two or more items of prior art. It all has to be in a  
22 single system.

23                  Furthermore, remember the burden of  
24 proof. We talked about this during jury selection. Our  
25 burden of proof, preponderance of the evidence, for

1 invalidity, a much higher burden of proof, clear and  
2 convincing evidence. And the Judge will instruct you as  
3 such.

4                   And the reason for that, remember, is  
5 that every patent that's issued by the United States  
6 Patent & Trademark Office is presumed to be valid,  
7 because it's gone through the examination process. And  
8 to overcome that presumption of validity, you need a  
9 higher amount of evidence. You need clear and  
10 convincing evidence.

11                   Now, let's talk about our system.  
12 Remember, in this -- this is just supposed to show that  
13 there -- there -- there are at least three parts to our  
14 system. You have the central controller, and you have a  
15 seller interface and an internet media venue interface;  
16 in other words, advertisers, websites, publishers.

17                   Remember how -- for -- to prove  
18 infringement, Dr. Rhyne walked you through each and  
19 every element of every single claim check by check by  
20 check.

21                   But remember, in contrast, Mr. Lanning,  
22 he walked you through Claim 1. We disagree that there  
23 was support for -- for what he was saying, but then at  
24 the end of it, they put up this chart and already  
25 checked off a bunch of stuff. They never even went

1 through the claim elements. That's not right.

2           You have to go through each and every  
3 element and prove by clear and convincing evidence that  
4 it exists. You can't just gloss over this and say, oh,  
5 it's kind of close or something.

6           You know, did he show you drop-down  
7 menus, menu-driven interfaces?

8           If you look at the actual documents that  
9 he was showing, they're not even interfaces, but he  
10 certainly didn't show you any menu-driven interface. As  
11 to patents, he didn't even talk about a design filter,  
12 which is one of the elements in one of the other claims.

13           He hasn't shown -- Google hasn't shown by  
14 clear and convincing evidence that each and every  
15 element of each and every one of these claims exists in  
16 the prior art. And, therefore, it's not invalidated.

17           Now, let's talk about DoubleClick.  
18 DoubleClick, as you'll recall from the testimony,  
19 required that the -- the advertiser and the publisher  
20 individually negotiate a contract each time.

21           Remember what I showed you in opening.  
22 That's one of the things that this invention was  
23 designed to overcome, to speed up that process, to  
24 automate it so that you didn't have to negotiate  
25 individually.

1           The reason was -- and this was admitted  
2 by Ms. Delfau on the stand -- you have to negotiate with  
3 each of the different advertisers. The DoubleClick  
4 system didn't have any automatic customization. There  
5 was no central system that was customized to make them  
6 comply with each publisher's rules.

7           Here's an example from the manual. Note  
8 that the value specified in an ad placement overrides  
9 the value specified in the site properties. That's  
10 exactly the opposite of our system.

11           The web -- we had the websites setting  
12 the presentation rules, and then the system makes it  
13 comply.

14           Here the advertisers had total control,  
15 and that's what I was talking about in opening when I  
16 told you the entire industry was headed in a different  
17 direction. They gave the advertiser total control over  
18 the look and feel of their ad, because they thought that  
19 advertisers wouldn't pay for it unless they had it.

20           In our invention, we saw it from the  
21 website operator's point of view, because Function Media  
22 operated a website, or at least Mr. Dean and Ms. Stone  
23 did. And that's why they conceived of a way that would  
24 allow the websites to have control over how their ads  
25 looked.

1                   And finally, there was no integrated  
2 system. You recall that Ms. Delfau admitted the ads  
3 don't go cross-network. And so think about this, and  
4 this applies to all of the invalidity contentions by  
5 Google.

6                   There's a weakness in their case. They  
7 chose not to cross-examine Dr. Rhyne on the stand  
8 regarding any of his validity testimony. He walked you  
9 through, testified how none of these references do what  
10 the Function Media technology does, and how the patents  
11 are indeed valid. They chose not to cross-examine  
12 Dr. Rhyne at all.

13                   Instead, they put Mr. Lanning up on the  
14 stand and led him into questions which ended up with him  
15 testifying about DoubleClick using an AdForce document.  
16 He just -- you know, he had the wrong system.

17                   Now --

18                   THE COURT: You've used 25 minutes.

19                   MR. TRIBBLE: Thank you, Your Honor.

20                   Let's talk about AdForce. Again, look at  
21 the documents. There's no seller interface. There's no  
22 prompting self-service interface on either side. You  
23 didn't see any user interface where you could  
24 automatically enter information.

25                   In fact, Mark Scheele admitted as much

1 right there on the stand. You're not going to be able  
2 to go through some easy-to-use interface.

3 He answers: That's fair. Yes.

4 There's no automatic customization. They  
5 have to have all of these things by clear and convincing  
6 evidence to invalidate these patents. It's just not  
7 there.

8 NetGravity. You heard Dr. Rhyne about  
9 NetGravity. All I'll say about it is this: In opening  
10 argument, Google's attorney told you he was going to  
11 rely on two prior systems: AdForce and DoubleClick.  
12 Here's an opening slide. Didn't even mention  
13 NetGravity. NetGravity is a red herring, and this is  
14 the most important point, perhaps, about validity.

15 The Judge will instruct you that the  
16 testimony -- they can't just say, oh, I recall that's  
17 how it operated 10 years ago. It has to be corroborated  
18 specifically in the documents. And you have to have  
19 testimony of a disinterested party. A disinterested  
20 party.

21 Every single witness that they presented  
22 was -- all of them were Google employees, except for  
23 one, and that remaining one was a paid consultant of  
24 Google. There is no disinterested testimony offering  
25 evidence on behalf of Google that these patents were

1 invalid.

2                   Finally, as to obviousness, the Judge  
3 will instruct you as to these factors regarding  
4 obviousness, but the first instruction is you must be  
5 careful not to determine obviousness with the benefit of  
6 hindsight. Everything is obvious once someone does it  
7 or puts it down on paper. Looking back, hindsight, it  
8 all looks obvious, but put yourself back in the year of  
9 2000.

10                   Was it obvious back then so long ago in  
11 the infancy of the internet?

12                   Dr. Rhyne says it was not.

13                   Now -- and just briefly, of course,  
14 the -- the biggest problem with the invalidity case are  
15 Google's own words. You've seen the documents where  
16 this was Sergey Brin's big idea, the documents where it  
17 was revolutionary. And moreover, when Susan Wojcicki  
18 gave the interview to USA Today newspaper, did she say,  
19 oh, this was old technology; oh, we're just copying  
20 AdForce or DoubleClick?

21                   No. She said this is a really novel  
22 idea.

23                   The Function Media patents predated that  
24 by years. The disclosure of their invention in 2000 was  
25 years before the AdSense system, and that's when it was



1 really, really novel.

2           Let me talk briefly about damages. You  
3 recall Mr. Wagner, Google's damages expert. He agreed  
4 that the purpose of a reasonable royalty is to  
5 compensate Function Media for the actual use of its  
6 property; that the test -- the test is the value to  
7 Google of this important technology; that important  
8 patents are usually licensed through litigation.

9           And the Judge will instruct you that one  
10 of the factors to consider are any royalty arrangements  
11 that were generally used and recognized in the  
12 particular industry at that time.

13           Industry rates, the rates used in the  
14 industry. And that's exactly what Mr. Bratic used. He  
15 showed you the average rates. He used -- there was an  
16 average of 13 percent right before the date of the  
17 hypothetical negotiation. His -- the rate he concluded  
18 was -- was lower, but that is an industry rate as  
19 referred to in the Court's instructions.

20           Google's expert admitted that he used to  
21 rely on exactly that same kind of data, but he chose not  
22 to in this case. You were cited other bases, these  
23 acquisitions of Google, the post -- all of these other  
24 ones here, this is unrelated technology.

25           The one that's on point is Applied

1 Semantics. It has a post-tax technology rate of 21.9  
2 percent, which -- when you look at the average of 8.6  
3 percent, Mr. Wagner and Mr. Bratic agree that you should  
4 be looking at the pretax, not post-tax. And when you  
5 make that adjustment, it equals exactly 12 percent,  
6 additional support for Mr. Bratic's number.

7           The technology rate that was applied by  
8 the experts that were valuing the technology, Applied  
9 Semantics, again, 21.9 percent.

10           This is the Stanford license. I think  
11 that I'll come back to this when I have a chance in  
12 rebuttal, but I'll just say this: Google's expert  
13 relies heavily on the Stanford license, and the fact of  
14 the matter is that in the Stanford license -- the  
15 purchase of only the licensing of the patent  
16 application, Google gave 2 percent of its entire company  
17 for that.

18           He values our patents at being worth  
19 about half of that. And the value of that 2 percent of  
20 stock that they gave to Stanford at the time of the  
21 hypothetical negotiation in this case was \$1.4 billion,  
22 and so half of that would be \$700 million.

23           Thank you.

24           THE COURT: Mr. Verhoeven?

25           MR. VERHOEVEN: Thank you, Your Honor.

1                   May I have one second to take down the  
2 slide and put one up?

3                   THE COURT: Yes, sir.

4                   MR. VERHOEVEN: Thank you.

5                   Charles, you can put that down for one  
6 second.

7                   Function Media, Mr. Dean and Ms. Stone in  
8 this case, have accused Google of infringing their  
9 patents.

10                  Google takes that accusation seriously.  
11 Google brought from California a senior vice president,  
12 Susan Wojcicki, to come talk to you, to tell you how the  
13 Google system works. Ms. Wojcicki was at Google at the  
14 start of the company.

15                  You remember there was testimony about  
16 how Google was started in a garage. It was her garage.  
17 She's now a senior vice president. She told you about  
18 Google and how it built AdSense for Content without any  
19 use of these patents prior to the issuance of these  
20 patents.

21                  We also brought, so that you could hear  
22 him testify, Mr. Jeff Dean. Mr. Dean was one of the  
23 visionary engineers who built the original AdSense for  
24 Content prototype. He built it on his own with his own  
25 engineers well before the patents in this case issued.

1                   We also brought from California  
2 Mr. Miller, Jason Miller. Mr. Miller testified to you  
3 he was currently responsible for the accused  
4 technologies, AdSense for Content, and he explained to  
5 you how they worked.

6                   We also presented to you the testimony of  
7 Mr. Lanning, our technical expert. And Mr. Lanning  
8 walked through the three reasons why Google does not  
9 infringe the claims here, which I'm going to go back  
10 over in a minute.

11                   Mr. Lanning also provided you with  
12 testimony about the subject of validity or invalidity,  
13 and walked you through two -- two references, two  
14 systems that were on sale prior to the patents.

15                   But that wasn't all. We also brought you  
16 actual witnesses who were involved in the development of  
17 those prior art systems. For AdForce, we brought you  
18 Mr. Scheele. For DoubleClick, we brought and had Mr.  
19 Dell -- or Mrs. Delfau and Rupp testify to you. And  
20 they told you, I was there; we did this; this was prior  
21 to the inventions.

22                   You also heard from several witnesses why  
23 the Plaintiff's damages claim in this case, \$600 million  
24 for only two and a half years, for a non-exclusive  
25 license, wasn't reasonable.

1                   So it's important -- if I may come around  
2 here, Your Honor -- to look at the timeline here.  
3 Google developed its first advertising program way back  
4 in '99. The patents here didn't issue until 2007.

5                   Google built the AdSense for Content  
6 prototype in 2002, well before any of these patents  
7 issued. They launched AdSense for Content in 2003.  
8 The testimony from Ms. Stone was that she started using  
9 AdSense for Content in her own bed-and-breakfast  
10 business in 2004.

11                  You also heard testimony from deposition  
12 of Mr. Dean -- he wouldn't admit it on the stand -- but  
13 his deposition, that they decided they were going to sue  
14 Google for patent infringement in 2005.

15                   Did they send a letter? No.

16                   Did they pick up the phone? No.

17                   Did they do anything to tell Google, hey,  
18 this system you've been building infringes and using all  
19 these engineers to develop infringes on our patents that  
20 we have? No, they didn't. They waited.

21                   And then on the very day the patents  
22 issued, they filed this lawsuit, and now say they're  
23 entitled to 65 percent of all the money, all the profit  
24 that Google made over developing this program.

25                   Is that fair? We don't think so.

1                   The undisputed evidence shows that  
2 Mr. Dean and Ms. Stone, they tried to develop a software  
3 program to work on -- that would embody their patent,  
4 but they couldn't. They tried to sell part of the  
5 product they developed, but no one liked it. They have  
6 no product, no consumers, no business.

7                   You were asked -- you're going to be  
8 asked to think about what would have happened in the  
9 hypothetical negotiation. Would Google really have  
10 agreed to pay \$600 million to license this patent in  
11 these circumstances?

12                   We think you'll conclude that they would  
13 not under these circumstances.

14                   Now, let me go into the details of the  
15 two defenses that Google has in this case. Remember in  
16 my opening statement, I told you there's two defenses  
17 that Google has. One is non-infringement; the second is  
18 invalidity.

19                   On the non-infringement subject, Google  
20 has presented evidence that there's three reasons why it  
21 doesn't infringe.

22                   And, Charles, if we could put it up on  
23 the screen.

24                   Okay. And we've seen this slide before.  
25 Now, Mr. Tribble said, oh, this is all word games. This

1 whole case is about words. Words are very important in  
2 a patent case.

3           Your charge is to look at the words of  
4 the claim as construed by the Court and ask yourself the  
5 question: Does the accused Google product perform this?  
6 And we presented three elements of the claims that are  
7 not infringed. And as you know, as I've told you and as  
8 the Judge will tell you, if there's one element that's  
9 not infringed in this case, you must find  
10 non-infringement.

11           Here we've got three, okay?

12           The first one is this element here:  
13 Seller is prompted to input information to create an  
14 electronic advertisement for publication to be selected  
15 in the internet media venues. I call this the creation  
16 step, for shorthand. This is at what's called the  
17 seller interface, okay?

18           And the seller is prompted by the system  
19 to enter information to create an electronic  
20 advertisement. And the Court's told us that what that  
21 means is that to create an electronic advertisement  
22 means for publication in a form customized to each of  
23 the selected internet media venue's presentation rules.

24           That means that at the seller interface,  
25 the advertiser in this case is prompted to input

1 information to create an advertisement customized to  
2 what?

3 Customized to the presentation rules of  
4 the internet media venue that was selected, okay?

5 We showed you that in the Google system,  
6 all that the seller can do is enter ad information,  
7 keywords, placements, and bids. The seller cannot  
8 change the color of the ads to conform with the  
9 presentation rules of the publisher. The seller cannot  
10 change the font in their ads to conform with the  
11 presentation rules of the media venue. Can't change the  
12 border settings.

13 It can only enter generic information.  
14 It's the same information no matter what the media venue  
15 the ads end up being presented on. It's undisputed  
16 evidence here that in the Google system, the seller  
17 cannot -- excuse me -- the seller cannot create an ad  
18 customized to each of the selected internet media  
19 venue's presentation rules.

20 You heard from our expert, Mr. Lanning,  
21 on direct exam on this subject. And remember, he showed  
22 you this screen. This is the actual screen that an  
23 advertiser would look at, if they are creating an ad.  
24 And as you can see, and as Mr. Lanning testified, they  
25 can only put in a headline, description, and a URL.



1 They cannot -- there's nothing they can do to customize  
2 that ad to presentation rules of the media venue.

3 Remember, he talked about, well, you can  
4 ask for hometips.com, which is a media venue, or you can  
5 ask for houseblogs.net, which is a media venue. They  
6 have different presentation rules, remember?

7 One had a blue -- the blue headline; one  
8 had a black; one had a border; one didn't have a border.  
9 Those are different presentation rules that the  
10 publishers have -- these sites have.

11 Can the advertiser customize this ad to  
12 those presentation rules? Absolutely not. There's no  
13 field in here to do that.

14 And Mr. Lanning testified they couldn't.  
15 But that's not all. Mr. -- Dr. Rhyne, the Plaintiff's  
16 expert, admitted the same thing. And I asked him this:  
17 Isn't it true, sir, that the advertisers cannot create  
18 an electronic advertisement in the form customized to  
19 each of the selected internet media venues presentation  
20 rules?

21 Yes.

22 They cannot do that, can they?

23 That's correct.

24 It's undisputed on this record. Both  
25 experts have found and told you that the advertiser at

1 the seller interface cannot create an ad that's  
2 customized to the presentation rules.

3           Their expert, Dr. Rhyne, on  
4 cross-examination admitted that. So that's number one.  
5 That's the first reason we don't infringe.

6           Number two goes to this other element. I  
7 refer to this in shorthand as the publishing-to element,  
8 and this is the element here highlighted, and it says  
9 publishing the electronic advertisement to one or more  
10 of the selected internet media venues.

11           And the Court has said that means placing  
12 or making available the customized electronic  
13 advertisement within the framework of and at each  
14 internet media venue. So the claim language says you  
15 have to publish the ad to the media venue. And the  
16 Court's construction says that means making it available  
17 at the internet media venue.

18           You heard from Mr. Jeff Dean from Google.  
19 He testified that back in 2002, when Google was  
20 developing the accused technology AdSense for Content,  
21 they considered doing it the way the patent talks about  
22 doing it. They considered having Google over here, the  
23 ad system, send the ad to the content provider. Content  
24 provider is another name for the publisher, which is the  
25 internet media venue.

1                   They considered doing that. And then the  
2 content provider would send it to the internet user.  
3 They thought about it. They didn't even know this  
4 patent existed. They thought about it and they decided  
5 this other method works better. And he testified to  
6 that.

7                   And this is the method Google uses. In  
8 the Google system, here's the media venue. In our  
9 example, we looked at it from a demonstrative, cnn.com.  
10 Here's Google and here's the internet user. Google does  
11 not send ads to the content provider or publisher.  
12 What does Google do?

13                   It serves the ad directly to the internet  
14 user. This is an internal document from Google's files.

15                   You heard Mr. Tribble say, well, they say  
16 this in litigation, but what did the document show back  
17 then?

18                   This is a document from back then, and  
19 this shows very clearly that Google considered the  
20 method that would be in the patent, rejected it, and  
21 used a different method.

22                   And he testified: Question: Where does  
23 Google send those ads?

24                   Answer: Directly to the user's browser.  
25 That's the internet user.

1                   Question: And is that the scheme you  
2 showed us earlier that you chose?

3                   Yes.

4                   Scheme two, right?

5                   Yes, scheme two.

6                   And is that scheme in use today for  
7 AdSense for Content?

8                   Yes.

9                   And has that scheme been used throughout  
10 the life for AdSense for Content since when it was first  
11 introduced today when people are using this as we sit  
12 here today?

13                  Yes. Absolutely.

14                  The testimony of Google's witnesses shows  
15 the Google system doesn't infringe.

16                  This is scheme one in a demonstrative.  
17 The ad system publishes to the internet media venue.

18                  This is the -- what the patent talks  
19 about, and the media venue then puts everything on the  
20 internet user. Google does not do that.

21                  Google does this. Google serves the ads  
22 directly to the internet user. It does not send the ads  
23 to the internet media venue, CNN. The claim language we  
24 just looked at says publish to the selected internet  
25 media venues. That means that, going up, publishing-to.

1 Google doesn't do that. Google publishes to the  
2 internet user. It does not infringe.

3 And, again, there's some documents that  
4 say we send ads to web -- to web pages. And the  
5 Plaintiff is making a big deal over those documents.  
6 Let's keep in mind -- let's keep focused on the fact  
7 it's undisputed that both technical experts do not  
8 dispute how the Google system works. Both say Google  
9 serves the ads.

10 So, for example, this is Dr. Rhyne,  
11 Plaintiff's expert. Question: And the server that's  
12 operated by cnn.com served up the web page, right?

13 Well, the server is operated by CNN. It  
14 serves up the framework of the web page.

15 Question: Serves up the web page.  
16 Doesn't serve up the ad, does it?

17 It does not serve up the ad. So he  
18 admits CNN is not serving the ad.

19 It doesn't even have the ad. Google  
20 serves the ad?

21 Answer: Yes. Undisputed.

22 What happens is Google sends that ad  
23 directly to the internet user. The publisher, the  
24 internet media venue, doesn't even know what the ad is.

25 So that's the second reason there's no

1 infringement. There's no publishing to the internet  
2 media venue.

3 Now, there's a third reason why there's  
4 no infringement, and that relates to the display here.

5 As you'll recall on the seller interface,  
6 it says the seller is prompted to input information to  
7 select one or more of the internet media venues -- let  
8 me start over.

9 The seller is prompted to input  
10 information to select one or more of the internet media  
11 venues, and then it goes on in the later step, the  
12 electronic advertisement is displayed on each of the one  
13 or more of the selected internet media venues.

14 The evidence shows this does not happen  
15 in the Google system. Now, you saw this when  
16 Mr. Lanning walked through this for us. The way the  
17 Google system works, as we saw, the seller inputs this  
18 information and submits a bid. It's just a bid. It's  
19 not selecting anything. It says here's my bid of this  
20 much money and here's my ad.

21 Then Google takes that, and this is  
22 represented just by a red square, and it puts that in  
23 his database, this big database of millions of millions  
24 of ads.

25 Is Google just -- does Google just take

1 that order and transfer it to selected media venues?

2 No. Google puts it in this database, and this ad, if  
3 it's ever going to get displayed, has to go through  
4 hurdles. And we went -- and Mr. Lanning went through  
5 this example, free dieting, where first the system --  
6 when a user goes to a web page, the Google system reads  
7 the web page and figures out what's the web page about.  
8 Figures out it's about dieting, eating, calories,  
9 weight. And then the next thing the Google system does  
10 is it takes this information about what the website is  
11 and eliminates the vast, vast majority of ads in its  
12 database, because they don't -- aren't relevant to this  
13 subject matter.

14                   So if your ad isn't relevant to the  
15 subject matter of a web page, it isn't going to get  
16 selected. Even if you say specifically I'd like to be  
17 on that web page, if the ad is not relevant, it's not  
18 going to get selected.

19                   In this example, it was selected because  
20 it was relevant. So it passed the first hurdle, but  
21 then there's a second hurdle. There's an auction that  
22 goes on in the Google system.

23                   And in order to get displayed, not only  
24 do you have to be relevant, you have to win the auction.  
25 And here the bid wasn't high enough. So there was no --

1 so it didn't win the auction. And even though in this  
2 example, the advertiser wanted to be on free dieting,  
3 the advertiser didn't get to be on free dieting, because  
4 it didn't win the auction process or the bid.

5                   So this goes back to the language I  
6 showed you earlier which says -- where the Court has  
7 said that the ad must be displayed on each of the  
8 selected internet media venues. That does not happen on  
9 the Google system. So this is a third reason why there  
10 isn't infringement.

11                   And, again, Plaintiff's own expert  
12 agrees. Question: And I could actually put in in the  
13 placement section specific websites that I hope and wish  
14 my ad would appear in, right?

15                   Answer: You can do it very specifically  
16 or a little less specifically, but you can specify  
17 targets you would like to get to.

18                   Okay. Would you agree with me that that  
19 doesn't mean that my ad is actually going to be  
20 displayed on that website, right?

21                   I would agree with you on that.

22                   So their own expert has agreed that on  
23 the Google system, a seller can say I want to be on 10  
24 websites, but there's no guarantee. It doesn't mean  
25 they're actually going to be displayed.



1                   Well, the claim language says it's  
2 displayed on each of the selected internet media venue  
3 sites. It doesn't happen. That's a third reason why  
4 there's no infringement here.

5                   And any one of these three reasons is  
6 sufficient for you members of the jury to find  
7 non-infringement.

8                   So this is just a summary of the three  
9 reasons why. You've already seen this, and Mr. Lanning  
10 has talked about it. I'm not going to go over it.  
11 Now, let's talk about the second defense that Google  
12 has. The second defense is that these patents are not  
13 valid. It's undisputed in this case that the two  
14 references that Mr. Lanning relied on for his opinions,  
15 AdForce and DoubleClick were never considered by the  
16 Patent Office. They aren't listed in the face of the  
17 patent as relevant art at all.

18                   So the Patent Office didn't know about  
19 these when it issued the patent. So my question -- my  
20 request to you as jurors, when you're looking at the  
21 evidence on validity, is to ask yourself the question:  
22 What if the Patent Office had known about this? What if  
23 the Patent Office did know -- what if it had this  
24 instruction manual? Which it didn't. But what if it  
25 did, would the result have been different?

1                   Would the Patent Office allow these  
2 patents to issue in light of that?

3                   We think the answer is no. But let me  
4 quickly go through the evidence.

5                   We showed you that AdForce was around in  
6 1998. We had a whole manual that I don't have in front  
7 of me that had detailed descriptions of how AdForce  
8 works. Mr. Lanning testified that the first interface  
9 element we've talked about is met in the AdForce system.  
10 And this is hard to read, but if you look up here, you  
11 can see it says ad sizes, and there's different sizes.

12                  Java you can select if you wanted your  
13 rules to be Java. All these are presentation rules.  
14 And this goes into the publisher interface, which is  
15 exactly what the patent is talking about.

16                  The second interface Mr. Lanning talked  
17 about, he showed you screen shots from the second  
18 interface. And it's hard to read again, but these are  
19 specific websites: CNN, classic car. These are checks  
20 that the advertiser can check to select specific  
21 websites. And that's in the advertiser interface, which  
22 AdForce had, same as the patent.

23                  Same thing with create. There's a box in  
24 there for creating electronic advertisement that's in  
25 the advertiser interface. Again, same as the patent.

1                   And the processing and publishing,  
2 Mr. Lanning talked about documents from the system that  
3 showed when a user views the web page, the web tag makes  
4 a request to an AdForce server for an advertisement,  
5 which is then delivered to the user. It's processed;  
6 it's published. It does the same thing as the patent.  
7 It did it beforehand, but the Patent Office didn't know  
8 about it.

9                   Same thing with DoubleClick DART. It  
10 existed in 1998 before the priority date. Again,  
11 Mr. Lanning went through meticulously to show you that  
12 these different interfaces are present in the  
13 DoubleClick DART.

14                   And here you may recall, he showed you  
15 this screen shot from the publisher interface, which  
16 allows the publisher to put in presentation rules, and  
17 that goes right here in the publisher interface part of  
18 the system.

19                   He then showed you the second interface  
20 and how that would be a web -- a menu that would go over  
21 here in the advertiser side, which is the second  
22 interface in the claims. And that goes to the central  
23 controller.

24                   He also showed you how the computer  
25 controller of the system would process and publish the

1 ads. All the three basic elements, the same thing that  
2 the patent talked about.

3 He concluded that AdForce did the same  
4 thing as the patents did beforehand. DoubleClick DART  
5 did the same thing as the patents did beforehand. The  
6 Patent Office didn't know about those.

7 And he also showed you that it would have  
8 been obvious, given these two things, to -- either alone  
9 or in combination with each other or this third site,  
10 NetGravity, it would have been obvious to combine those  
11 or look at those, if there's one element missing, to add  
12 that element.

13 So you've got evidence here, very  
14 substantial evidence. I don't know how more clear and  
15 convincing you can get than a great big user manual that  
16 has all these screen shots in it. And that's in  
17 evidence in this case, and the evidence shows clearly  
18 these patents are not valid.

19 Now, let me finish by talking about  
20 damages. We think that -- we think that there are no  
21 damages in this case. Let me be crystal clear. We  
22 don't think there's liability.

23 We strongly urge you to consider the  
24 evidence. There's no infringement. There's three  
25 reasons why there's no infringement. And these patents,

1 we believe, aren't valid, because these other pieces of  
2 art that the Patent Office didn't know about.

3           We think damages should be zero, because  
4 there's no liability. But we only have one chance to  
5 address you, and if you disagree with us and you think  
6 there is liability, we have to deal with damages. And  
7 so I'm going to talk about damages a little bit.

8           Now, the Plaintiff presented Mr. Bratic  
9 as an expert witness on damages. And he'll -- he gave  
10 you the opinion that Google would in a -- remember the  
11 test is a hypothetical negotiation in 19 -- or in 2007.  
12 What would Google have agreed to? What would Function  
13 Media have agreed to?

14           And he said that Google would have agreed  
15 to \$607.3 million, over approximately 65 percent of all  
16 money it would make on this complicated system.

17           Well, we showed you on cross-examination  
18 some real-world actual patent license agreements that  
19 Google had entered into. With the exception of  
20 Stanford, none of them had been relied upon by  
21 Mr. Bratic. These are real-world agreements. You saw  
22 them; I put them on the screen on cross-examination.

23           The Stanford agreement, when it was  
24 entered into in 1998, conservatively, Google paid  
25 \$600,000, not \$600 million. The Meyer agreement, in

1 1998, three patents, two applications, \$3.5 million is  
2 what Google actually paid in the real world.

3           Again, Mr. Bratic says, oh, they went for  
4 less patents. And this, by the way, was a purchase of  
5 the entire patent, not a license for a non-exclusive  
6 license to use it, but bought the entire patents for  
7 3.5.

8           Yet Mr. Bratic says Google would have  
9 agreed just for a bare license of two of the accused  
10 products to pay \$600 million, not \$3.5 million.

11           The VoiceAge, we looked at that  
12 agreement. Over a hundred patents were licensed in the  
13 VoiceAge agreement. For two and a half years, Google  
14 paid \$5 million. Five million dollars is a lot less for  
15 a hundred patents than \$600 million for two licenses --  
16 license for two patents.

17           Alcatel-Lucent, huge corporation, one of  
18 the telephone company corporations. Google licensed a  
19 bunch of patents from them. We looked at that. How  
20 much did they pay for two years? \$15 million.

21           And then finally, Hewlett-Packard, one of  
22 the biggest computer corporations in the United States  
23 of America, a whole passel of patents licensed by Google  
24 from them. How much? \$20 million.

25           That's the most. And yet Mr. Bratic

1 ignores all of this and -- and talks about industry  
2 rates and acquisitions and distribution agreements,  
3 things that aren't patent license agreements, and comes  
4 up with \$607 million, exponentially higher than anything  
5 that Google actually agreed to or actually would agree  
6 to.

7                   It's important to remember that when  
8 you're talking about and thinking about how much Google  
9 would pay in a hypothetical negotiation, you have to  
10 look at the Google product, AdSense for Content, and the  
11 patent and say, well, what does -- is the reason that  
12 the Google product is so successful attributable to the  
13 patent or something else?

14                   Well, you heard testimony that the reason  
15 the product was successful was because it does this  
16 contextually targeting -- contextual targeting, a  
17 revolutionary technology that allows Google every time  
18 someone assessed a web page, to have ads that are  
19 relevant to that web page. That was a huge  
20 technological innovation.

21                   But Mr. Tribble and Mr. Wagner had this  
22 colloquy about it. Question: So the first item  
23 unrelated to the patents-in-suit is that Google systems  
24 provide contextually relevant ads. That contextual  
25 targeting, that is something that Google had been doing

1 prior to the year prior to AdSense Online; is that  
2 right?

3                   That's correct. So Mr. Tribble agrees  
4 contextual targeting is not related to the patents here.  
5 And that's one of the primary reasons Google's AdSense  
6 for Content is successful.

7                   And there's other things. The search  
8 engine, the brand value, the advertising auction  
9 technology that happens millions of times every fraction  
10 of a second that allows for this sophisticated process  
11 to work, none of that has anything to do with the  
12 patent.

13                   Mr. Tribble: Not related to the patents?

14                   I agree with that.

15                   So would Google -- ask yourself this:  
16 Given that contextual targeting and auction process, if  
17 those are the innovative features that made Google so  
18 successful in AdSense for Content, have nothing to do  
19 with the patent, would Google have agreed to give 65  
20 percent of the money it made from contextual targeting  
21 and its brand and its auction process?

22                   And the answer is no.

23                   You heard from Ms. Wojcicki. She was  
24 asked if someone said to you they want 600 million for a  
25 couple of patents, what would you do?



1                   She says: That's a huge amount of money.  
2 This is a senior vice president. This is not an expert  
3 witness, Members of the Jury. This is a senior vice  
4 president of Google telling you what the truth is.

5                   That's a huge amount of money. So I've  
6 sat in every deal review the company has had -- or I've  
7 tried to sit in every deal review and I've never seen  
8 this license technology or patents or anything -- to  
9 anything even close to that number.

10                  Yet Mr. Bratic says it doesn't matter.  
11 I'm still saying \$605 million.

12                  Ms. Wojcicki was asked: What would you  
13 do if you were presented with that?

14                  She said: We would find a way to work  
15 around it. Now, this is important, because when you're  
16 asked to think about hypothetical negotiation, one of  
17 the factors you look at is how easy could Google simply  
18 change its product?

19                  Even assuming it infringes, which we  
20 contend it does not, could it make a change that would  
21 remove any doubts? And if it could, how much would that  
22 cost and would that be cheaper than paying 65 percent of  
23 your profits?

24                  That's one of the things you need to look  
25 at.

1 THE COURT: You've got 15 minutes  
2 remaining.

3 MR. VERHOEVEN: Thank you, Your Honor.

4 And we presented evidence from Jason  
5 Miller that Google not only could but already has  
6 developed a system that there's no way could be argued  
7 and argued that infringes in this case. And that system  
8 is called Explorer.

9 And he testified that, generally, what  
10 Explorer is, is that Google will not require an  
11 advertiser to give us any keywords or placements, any  
12 hints on where they want their ads to be shown. Google  
13 does all that work for them, and Google basically  
14 determines where we think the ad will do well, on what  
15 publishers we should show the ad.

16 I apologize, Your Honor. I just need to  
17 put this up.

18 Now, this is important. This Explorer  
19 system would change the Google system so that the seller  
20 interface -- the seller couldn't ask for a website. It  
21 couldn't put in [www.borders.com](http://www.borders.com). It couldn't even say I  
22 want some keywords associated with my ad.

23 All the seller could do using Explorer is  
24 put in the title and the ad text and the URL. That's  
25 it. There's no information input by the seller saying

1 anything about where they want their ad to go.

2                   Okay. Well, the claim language here on  
3 the second interface says a second interface to the  
4 computer system through which the seller is prompted to  
5 input information to select one or more of the internet  
6 media venues. That's a requirement of the claims.  
7 But this Explorer system wouldn't allow the seller to  
8 input anything. Can't ask for a website. Can't even  
9 ask for a keyword. There's no opportunity for the  
10 seller to input information to select one or more of the  
11 internet media venues.

12                   This is what's called a design-around.  
13 Google not only could do this, they have. Mr. Miller  
14 said that this was already in beta form. So when you're  
15 thinking about the hypothetical negotiation, you need to  
16 keep in mind that in the hypothetical negotiation,  
17 Google already has a system that they've developed in  
18 beta form that unquestionably wouldn't do this input  
19 information to select.

20                   And rather than pay 65 percent of all  
21 their profits and \$600 million, they could simply  
22 implement that system, and there wouldn't be any  
23 infringement. So that would lower the amount that a  
24 hypothetical negotiation amount would be. And so this  
25 is an important thing to remember.

1                   So let me conclude briefly. We think  
2 that -- there's no liability in this case, no  
3 infringement. The patents are invalid. Damages should  
4 be zero. We walked through that with you.

5                   There's a couple of other points just to  
6 bear in mind when you're thinking about this. This case  
7 is not about copying. There's no allegation by the  
8 Plaintiffs that Google knew about these patents and did  
9 something wrong, that they knew about these patents and  
10 said, oh, we're going to do this anyway.

11                  Google didn't know. You saw the timeline  
12 I just showed you. Google developed AdSense for Content  
13 and later AdSense for Mobile. That was built by Google  
14 with its own engineers with its own ingenuity, and it  
15 made it very successful through a lot of hard work.

16                  These patents didn't even exist. They  
17 weren't even issued. Google didn't know anything about  
18 them. There's no question in this case that Google knew  
19 about something and acted badly. It didn't.

20                  Google doesn't infringe. And -- and what  
21 this case is really about is a Plaintiff who got a  
22 patent; was using the Google system and thought, well, I  
23 can make some arguments and file a lawsuit; who didn't  
24 call Google; didn't tell Google, hey, we think that  
25 there's a problem here; can we work it out?

1                   Instead, they waited. They did nothing.  
2 And on the very first day their patent issued, the very  
3 first day, without a phone call, without anything, they  
4 filed a lawsuit, and they say give us 65 percent of your  
5 profits.

6                   Google is not taking any land from  
7 Mr. Dean and Ms. Stone, to use the property-line  
8 analogy. What's going on here, Members of the Jury, is  
9 that Function Media is trying to make a land grab from  
10 Google.

11                  That concludes my closing argument. I  
12 want to thank you all. You've all been very attentive,  
13 and I appreciate the taking notes. And thank you for  
14 your time.

15                  THE COURT: Thank you, Counselor.

16                  Mr. Tribble? You've got about 14 minutes  
17 remaining.

18                  MR. TRIBBLE: Thank you, Your Honor.

19                  Land grabbing. You can imagine Exxon  
20 making the same arguments of if they drilled a well on  
21 your property, if you didn't have a well or you tried to  
22 drill a well and it didn't succeed, you don't have  
23 refineries; you don't have all the employees and  
24 equipment that we do.

25                  But the fact of the matter is that they

1 did drill a well on your property, generated \$5 billion,  
2 and they would be liable to pay you a reasonable  
3 royalty. All of this, word games.

4 I was stunned that they made this  
5 design-around alternative argument still. Remember, at  
6 the beginning of the case, their original argument was  
7 every one can switch from AdSense Online to AdSense  
8 Direct.

9 But then, of course, on  
10 cross-examination, it turned out that just wasn't true.  
11 It wasn't feasible. That's exactly what Jason Miller  
12 testified to. Word games.

13 The -- we finally have it admitted clear  
14 and upfront that context targeting and the auction  
15 process are not involved in the issue of whether there's  
16 infringement here.

17 Remember how much testimony we heard on  
18 that? Hours and hours. Finally, the truth is out.  
19 It's been word games and distractions all the way along.  
20 The -- Google on its -- more word games. It's  
21 non-infringement arguments. Seller is prompted to input  
22 information to select. It's not -- they're reading it  
23 as seller is prompted to select.

24 All they have to do is put information  
25 in. And as to the design-around argument, after the

1 first one failed, then they came up with this Explorer  
2 system where on that -- unlike the ones that are  
3 actually at issue here, they don't put any keywords in,  
4 okay -- inputting information.

5           As Dr. Rhyne explained, it does infringe  
6 this system, or it would if they ever actually turned it  
7 on commercially, because you have to type in the text.  
8 Those become the new keywords.

9           And guess what? Mr. Lanning didn't rebut  
10 that testimony. The sole expert testimony on that issue  
11 is that that design-around is no design-around at all.  
12 Let's go through. I wanted to point out the Judge will  
13 instruct you on obviousness, that there are these  
14 factors that if they're present, they tend to show that  
15 the idea was not obvious.

16           First of all, you have to show some kind  
17 of system and reasons to combine that just aren't  
18 present here. But the Judge will instruct you that the  
19 factor such as the commercial success of a property.  
20 Due to the merits of the claimed invention, the product  
21 is AdSense, the AdSense AdWords system.

22           The fact that it's Google's product, that  
23 doesn't mean that it doesn't count. The success of that  
24 invention, if you find infringement, that means it is  
25 the patented invention. The tremendous success of

1 AdSense shows that it was not obvious to the industry.  
2 Otherwise, there would have been dozens and dozens and  
3 dozens of people out there doing it.

4           The unexpected and superior results, the  
5 long-felt need for the solution, acceptance by others  
6 and the awards and praise that the AdSense AdWords  
7 system has achieved.

8           Let's go through damages. Remember both  
9 experts agree it's the value to Function Media, not to  
10 Google. And I want you to remember earlier this month,  
11 you were asked in jury selection that if the law and the  
12 evidence were such that it proved that Function Media  
13 were entitled to as much as \$600 million, would you be  
14 willing to follow the law and award that amount of  
15 money?

16           And I think that's where we're at. Let's  
17 go through it.

18           Remember, Mr. Bratic, he started with the  
19 average industry royalty rates for internet advertising,  
20 same methodology relied on by Google's expert until  
21 hired by Google. He cited all these other rates.  
22 The Stanford license he says that were worth half of the  
23 Stanford license. If you look at the equity value,  
24 which is what Stanford actually got, equity, it's \$1.4  
25 billion dollars. Half of that is 700 million.



1 And by the way, Mr. Wagner, this methodology that he  
2 admits he's never done before, and as far as he knows,  
3 no one's ever done this before, you know, he turns that  
4 2-percent equity in the company, turns it into --  
5 somehow into a 0.25-percent running royalty.

6 Remember that applies to the -- the  
7 revenues of all of Google, not just for the accused  
8 products. \$56 billion and when you multiply that out,  
9 even by his own methodology, the reasonable royalty is  
10 \$140 million.

11 Other than the Stanford license, he  
12 relies on the Carl Meyer license. There's been no  
13 testimony -- that unlike our patents, which are core  
14 technology used by Google, had generated \$5 billion,  
15 there's no testimony that they even use the Carl Meyer  
16 technology, that it has anything to do with anything.  
17 And so it's like saying if someone stole your sports car  
18 and crashed it and you wanted to recover the fair value,  
19 someone would say, well, I owe you a hundred dollars  
20 because I bought this beat up old wreck for a hundred  
21 dollars, and they're both cars.

22 That means nothing. There's no  
23 applicability of the Carl Meyer patent.

24 And by the way -- Your Honor, we may have  
25 to clear the courtroom for this next slide.

1 THE COURT: Okay. Well, ladies and  
2 gentlemen in the audience, I'm going to have to ask you,  
3 if you're not covered by the terms of the Court's  
4 protective order, to please exit the courtroom at this  
5 time. I'll invite you back in momentarily.

6 [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
7 SEALED BY ORDER OF THE COURT  
8 [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
9 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
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[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

SEALED BY ORDER OF THE COURT

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18 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
19 [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
20 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
21 [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]  
22 THE COURT: Okay. You can go ahead and  
23 proceed, Mr. Tribble.  
24 MR. TRIBBLE: Question No. 1 that is  
25 asked is, do you find that Function Media has proven by

1 a preponderance of the evidence that Google has directly  
2 infringed Claims 1, 20, 37, 52, 63, 90, 179, and 231 of  
3 the U.S. Patent No. -- the '025.

4 Those are exactly -- Dr. Rhyne walked you  
5 through each and every element, each and every one of  
6 those claims.

7 And so we would ask that you find those  
8 patents infringed and that for both products, AdSense  
9 for Content Online and AdSense for Mobile, which the  
10 testimony by all the witnesses worked exactly in the  
11 same way for purposes of these patents, that you answer  
12 those questions yes, yes, yes, there was infringement.

13 The second question you'll be asked will  
14 be the same question for the '059 patent. Do you find  
15 that it has infringed?

16 Answer: Yes, yes.

17 The next question you'll be asked: Do  
18 you find that Google has proven by clear and convincing  
19 evidence that any of the following claims of the '025  
20 patent are invalid for the following reasons?

21 Yes means the claims are invalid.

22 No means the claims are valid.

23 And you have to look at each claim,  
24 because there are extra elements in the various claims.  
25 But the clear answer is actually in our favor.

1                   But certainly, there's no -- Google has  
2 failed to meet the clear and convincing standard for  
3 proving that any of these claims are invalid. And so we  
4 would ask that you answer those claims no, no, no, the  
5 patents are valid.

6                   Same question as to obviousness. No, no,  
7 no, no.

8                   Same questions for the '059 patent. Is  
9 it anticipated by the prior art or rendered obvious?

10                  No.

11                  And finally, if you find that the patents  
12 are infringed and you do not find that they're invalid,  
13 then you answer Question 5 -- do you find that Google  
14 has proven -- oh, excuse me. This is for the '059 --  
15 yeah, here it is.

16                  The question is wrong on the chart, but  
17 the question is: What sum of money, if any, if paid now  
18 in cash would fairly and reasonably compensate the  
19 Plaintiff as a reasonable royalty for any infringement  
20 you have found? Answer in dollars and cents.

21                  And you have to answer in dollars and  
22 cents, but remember, both experts agree that the  
23 appropriate way to calculate the reasonable royalty in  
24 this case -- there's no dispute among the experts -- is  
25 to take the revenue base and multiply it. And I believe

1 both experts in their calculations have used \$5 billion.

2 THE COURT: You've got one minute left.

3 MR. TRIBBLE: And the difference is that  
4 Mr. Bratic applies a rate of 12 percent, and you just  
5 multiply them together, and that's \$600 million.

6 And Mr. Wagner applies a rate of 0.25  
7 percent. Again, you've seen the various rates, the  
8 percentages that the licenses and acquisitions roll  
9 into. And you heard Mr. Bratic talk about a rate of 8  
10 percent as well, which would be a reasonable royalty of  
11 \$400 million.

12 At the end of the day, it's totally  
13 within your discretion. And I know that on behalf of  
14 Function Media and Michael Dean and Lucinda Stone, we  
15 want to thank you. You have been very attentive  
16 throughout the entire case. We really want to thank you  
17 for paying such close attention.

18 We ask you to listen to the law, apply  
19 and weigh the evidence and render your verdict.

20 Thank you.

21 THE COURT: All right. Ladies and  
22 Gentlemen of the Jury, you have heard the evidence  
23 presented by the parties to this suit and the argument  
24 of the respective attorneys in support of their  
25 positions.

1           It is now my duty to give you the charge  
2 in this case. It will be an oral charge and is given in  
3 an effort to assist you in your deliberations in  
4 deciding the issues which you must decide in order to  
5 reach a fair and impartial verdict in this case.

6           Perhaps this function of the Court is the  
7 most important one that the Court performs in the trial  
8 of a case, so I ask you to pay close attention to my  
9 remarks.

10           You will remember that at the beginning  
11 of the trial, I gave you some general instructions and  
12 definitions. Rather than repeat them, I ask you to  
13 recall them now in deciding the facts and issues which  
14 you are to decide.

15           As I instructed you at the beginning of  
16 the trial, you are the exclusive judges of the facts,  
17 the credibility of the evidence, and the weight to be  
18 given the testimony of the witnesses.

19           You are to perform your duty without bias  
20 or prejudice to any party. The law does not permit  
21 jurors to be governed by sympathy or prejudice.

22           A corporation and all other persons,  
23 including the Plaintiff and Defendant in this case, are  
24 equal before the law and must be treated as equals in a  
25 court of justice. The law is no respecter of persons.



1           The Court and the parties expect that you  
2 will carefully and impartially consider all of the  
3 evidence, follow the law, as I will give it to you, and  
4 reach a just verdict.

5           I will now briefly review the contentions  
6 of the parties and give you some additional instructions  
7 and definitions that will guide you in -- in deciding  
8 the issues or facts that you must resolve in this case.

9           With respect to the Plaintiff's claims  
10 and the Defendant's defenses, the Plaintiff, Function  
11 Media, contends that the Defendant, Google, infringes  
12 certain claims of the two United States patents,  
13 specifically Claims 1, 20, 37, 52, 63, 90, 179, and 231  
14 of U.S. Patent No. 7,240,025 B2, which has been referred  
15 to as the '025 patent, and Claim 1 of United States  
16 Patent No. 7,249,059 B2, which has been referred to as  
17 the '059 patent.

18           Specifically, Function Media contends  
19 that Google directly infringes the asserted claims of  
20 the '025 and the '059 patents by making and using  
21 AdSense for Content Online and AdSense for Mobile  
22 Online. Function Media seeks damages in the form of a  
23 reasonable royalty to compensate it for Google's alleged  
24 infringement.

25           Google denies Function Media's

1 assertions. Specifically, Google denies that either  
2 AdSense for Content Online or AdSense for Mobile Online  
3 directly infringes Claims 1, 20, 37, 52, 63, 90, 179,  
4 and 231 of the '025 patent and Claim 1 of the '059  
5 patent.

6 Google also contends that the asserted  
7 claims of the '025 and the '059 patents are invalid.

8 Function Media bears the burden of proof  
9 by a preponderance of the evidence that Google directly  
10 infringes the asserted claims of the '025 and '059  
11 patents.

12 Function Media also has the burden of  
13 proving by a preponderance of the evidence the amount of  
14 damages caused by Google's infringement. Google bears  
15 the burden of proof by clear and convincing evidence  
16 that the asserted claims of the patents are invalid.

17 I will now give you some instructions and  
18 definitions to help you in answering the questions to  
19 follow.

20 Now, with respect to patent infringement,  
21 claim interpretation, Function Media contends that  
22 Google committed patent infringement. To decide the  
23 questions of infringement, you must first understand  
24 what the claims of the patent cover, that is, what they  
25 prevent anyone else from doing. This is called claim

1 interpretation.

2                   It is my duty under the law to interpret  
3 what the words used in the patent claims mean. I have  
4 made my determination, and I will instruct you  
5 accordingly. You must apply the meaning I give the  
6 patent claims to your decisions on infringement and  
7 validity.

8                   I will now instruct you how those words  
9 are to be construed and understood when deciding the  
10 issues of infringement and validity.

11                   You have been provided with written  
12 copies of the '025 and '059 patents and copies of these  
13 claim term definitions, and you may use them in your  
14 deliberations.

15                   Now, publishing means the act of placing  
16 or making available the presentation or information  
17 within the framework of a media venue so that it is  
18 accessible by the end-users, consumers, viewers, or  
19 buyers.

20                   Presentations means any content intended  
21 to inform or influence the viewers or readers of a given  
22 media venue. It may be in an advertising, public  
23 service, editorial, informational, or any other format.  
24 It may be text, graphics, audio, multimedia, or a  
25 combination of any communication methods.

1                   Now, seller means a person, corporation,  
2 partnership, group, or any other legal entity that  
3 desires representation of its goods, products, services,  
4 reservations for services, ideas, views, or any legal  
5 intent or desire to be made public and offered for sale,  
6 exchange, trade, or distribution either paid for or  
7 free.

8                   Network of computers means two or more  
9 computers that may communicate either continuously or on  
10 demand for the purpose of sharing, processing,  
11 transferring information and data.

12                  Media venues means those physical or  
13 virtual locations where presentations are placed or made  
14 available to present the information within the  
15 framework of the media so that it is accessible by the  
16 end-users, consumers, viewers, or buyers.

17                  Internet media venues means internet  
18 locations where presentations are placed or made  
19 available to present the information within the  
20 framework of the media so that it is accessible by the  
21 end-user, consumers, viewers, or buyers.

22                  Presentation rules means rules to be set  
23 by a media venue for use in creating advertisements to  
24 be published on that media venue.

25                  Create an electronic advertisement for

1 publication to the selected internet media venues means  
2 create an electronic advertisement for publication in a  
3 form customized to each of the selected internet media  
4 venue's presentation rules.

5                   Selection information input by the seller  
6 means the selection of information input by the seller  
7 that targets one or more media venues.

8                   Blocked URLs means internet locations  
9 that are precluded from displaying a presentation.

10                   Third-party professional means  
11 professional individuals, as well as business entities,  
12 that traditionally create and manage advertising either  
13 in whole or in part for sellers or supply content,  
14 products, and services to those that create and manage  
15 advertising.

16                   Create an electronic advertisement for  
17 the seller for publication to the selected internet  
18 media venues means create an electronic advertisement  
19 for publication in a form customized to each of the  
20 selected internet media venue's presentation rules.

21                   First interface to the computer system  
22 means software that enables the internet media venue  
23 user to interact with the computer system.

24                   Second interface to the computer system  
25 means software that enables the seller user to interact

1 with the computer system through which the seller user  
2 is prompted to -- to enter information to select one or  
3 more internet media venues.

4 Publishing the electronic advertisement  
5 to one or more of the selected internet media venues  
6 means placing or making available the customized  
7 electronic advertisement within the framework of and at  
8 each internet media venue so that it is accessible by  
9 the end-users, consumers, viewers, or buyers.

10 Processing the electronic advertisement  
11 in compliance with the presentation rules of the  
12 internet media venue means executing a systemic sequence  
13 of mathematical and/or logical operations upon the  
14 customized electronic advertisements to make it comply  
15 with the presentation rules of the internet media  
16 venues.

17 Design or style standards means  
18 presentation rules which control the look and feel of an  
19 advertisement.

20 Automatically apply or compare the  
21 internet media venue design or style standards to the  
22 information input by the seller or the advertisement  
23 means execute a systemic sequence of mathematical and/or  
24 logical operations to apply or compare the internet  
25 media venue's design or style standards to the

1 information input by the seller or to the advertisement.

2           Automatically apply or compare the  
3 internet media venue distribution factors to the  
4 information input by the seller or the advertisement  
5 means execute a systemic sequence of mathematical and/or  
6 logical operations to apply or compare the internet  
7 media venue's distribution factors to the information  
8 input by the seller or to the advertisement.

9           Publish the advertisement to the internet  
10 media venue means place or make available the customized  
11 electronic advertisement within the framework of and at  
12 each media venue so that it is accessible by the  
13 end-users, consumers, viewers, or buyers.

14           The third-party professional is prompted  
15 to input information to select one or more of the  
16 internet media venues means the third-party professional  
17 is prompted to input information to select one or more  
18 internet media venues.

19           Now, with respect to determining  
20 infringement, once the patent is issued, the owner of a  
21 patent has a right to exclude others from making, using,  
22 offering to sell, or selling the patented invention  
23 throughout the United States or importing the patented  
24 invention into the United States for a period of 20  
25 years.

1           Thus, infringement occurs when a person,  
2 without the owner's permission, makes, uses, offers to  
3 sell, or sells the patented invention anywhere in the  
4 United States or imports the patented invention into the  
5 United States while the patent is in force.

6           To determine whether there is an  
7 infringement, you must compare the allegedly infringing  
8 product with the scope of the patent claims as I have  
9 defined them for you.

10           In order to infringe a patent claim, a  
11 product or method must include each and every limitation  
12 of the claim.

13           In determining whether Google infringes  
14 Function Media's asserted claims, you must determine  
15 whether AdSense for Content Online or AdSense for Mobile  
16 Online or their methods of use contain each and every  
17 limitation recited in a claim.

18           A claim limitation is present if it  
19 exists in the accused product or its method of use just  
20 as it is described in the claim language, either as I  
21 have explained that claim language to you, or if I did  
22 not explain it, as it would be understood by one of  
23 skill in the art.

24           If AdSense for Content Online and AdSense  
25 for Mobile Online or their methods of use omit even a



1 single limitation, then you must find that the claim is  
2 not infringed.

3           You must consider each of the patent  
4 claims separately. If you find that each and every  
5 limitation of a patented claim is found in the accused  
6 products or their methods of use, then the claim is  
7 infringed, even if the accused products or their methods  
8 of use may be more or less efficient or may include  
9 additional features or functions not found in the  
10 claims.

11           Whether or not Google knew that what it  
12 was doing was an infringement does not matter for direct  
13 infringement.

14           A person may be found to be a direct  
15 infringer of a patent even if he or she believed in good  
16 faith that what he or she was doing was not an  
17 infringement of any patent and even if he or she did not  
18 even know of the patent.

19           You have heard evidence in this case  
20 about Google's own patents relating to certain of its  
21 products or methods; however, owning a patent is not a  
22 defense to infringement of another patent.

23           A party can infringe someone else's  
24 patents even though it may have patents of its own.

25           Now, the asserted claims use the word

1 comprising. When a claim uses the word comprising,  
2 comprising means including or containing.

3 A claim that uses the word comprising or  
4 comprises is not limited to products or methods having  
5 only the elements that are recited in the claim but also  
6 covers products or methods that add additional elements.

7 Let's take as an example a claim that  
8 covers a table. If the claim recites a table comprising  
9 a tabletop, legs, and glue, the claim will cover any  
10 table that contains these structures, even if the table  
11 also contains other structures, such as a leaf or wheels  
12 on the legs.

13 Now, you are instructed that infringement  
14 of a United States patent may occur only in the United  
15 States. In determining whether infringement occurs  
16 within the United States, there are two different  
17 standards for what counts as occurring within the United  
18 States.

19 The first standard is used for patent  
20 claims that cover a system; in this case, Claims 1, 20,  
21 37, 52, 63, and 90 of the '025 patent and Claim 1 of the  
22 '059 patent.

23 For these claims, a system is used within  
24 the United States if the system as a whole is put into  
25 service within the United States.

1           A system is put into service within the  
2 United States if:

3           (1) control of the system is exercised  
4 within the United States;

5           And (2) the beneficial use of the system  
6 is obtained within the United States.

7           For patent claims that cover a method, in  
8 this case, Claims 179 and 231 of the '025 patent, a  
9 different standard is used.

10           A claimed method is used within the  
11 United States only if every step of the claimed method  
12 is performed within the United States.

13           In determining whether a person, without  
14 the owner's permission, offered to sell the patented  
15 invention anywhere in the United States, an offer to  
16 sell occurs in the United States if it was extended  
17 within the United States.

18           Let's talk about dependent claims. My  
19 instructions on infringement so far have related to  
20 independent claims. Patent claims may exist in two  
21 forms referred to as independent claims and dependent  
22 claims.

23           An independent claim does not refer to  
24 any other claim of the patent. Thus, it is not  
25 necessary to look at any other claim to determine what

1 an independent claim covers.

2           Claims 1 and 179 of the '025 patent and  
3 Claim 1 of the '059 patent are independent claims.

4           A dependent claim refers to at least one  
5 other claim in the patent. A dependent claim includes  
6 each of the elements of the other claim to which it  
7 refers, plus additional elements recited in the  
8 dependent claim itself.

9           Claim 20 of the '025 patent is a  
10 dependent claim that depends on Claim 6. In order for  
11 you to find Claim 20 of the '025 patent is infringed,  
12 you must first find that Claims 1 and 6 are infringed.

13           If you find that independent Claim 1 or  
14 that dependent Claim 6 of the '025 patent is not  
15 infringed, you must find that independent Claim 20 is  
16 not infringed.

17           Claim 37 of the '025 patent depends on  
18 Claim 36. In order for you to find that Claim 37 of the  
19 '025 patent is infringed, you must first find that  
20 Claims 1, 31, 32, and 36 are infringed.

21           If you find that independent Claim 1 or  
22 that dependent Claims 31, 32, or 36 of the '025 patent  
23 are not infringed, you must find that dependent Claim 37  
24 is not infringed.

25           Claim 52 of the '025 patent depends on

1 Claim 47. In order for you to find that Claim 52 of the  
2 '025 patent is infringed, you must first find that  
3 Claims 1 and 47 are infringed.

4 If you find that independent Claim 1 or  
5 that dependent Claim 47 of the '025 patent is not  
6 infringed, you must find that dependent Claim 52 is not  
7 infringed.

8 Claim 63 of the '025 depends on Claim 46.  
9 In order for you to find that Claim 63 of the '025  
10 patent is infringed, you must first find that Claims 1,  
11 6, 28, and 46 are infringed.

12 If you find that independent Claim 1 or  
13 that dependent Claims 6, 28, or 46 of the '025 patent  
14 are not infringed, you must find that dependent Claim 63  
15 is not infringed.

16 Claim 90 of the '025 patent depends on  
17 Claim 62. In order for you to find that Claim 90 of the  
18 '025 patent is infringed, you must first find that  
19 Claims 1, 31, 45, and 62 are infringed.

20 If you find that independent Claim 1 or  
21 that dependent Claims 31, 45, or 62 of the '025 patent  
22 are not infringed, you must find that dependent Claim 60  
23 is not infringed -- or excuse me -- dependent Claim 90  
24 is not infringed.

25 Claim 231 of the '025 patent depends on

1 Claim 226. In order for you to find that Claim 231 of  
2 the '025 patent is infringed, you must first find that  
3 Claims 179 and 226 are infringed.

4 If you find that independent Claim 179 or  
5 that dependent Claim 226 of the '025 patent are not  
6 infringed, you must find that dependent Claim 231 is not  
7 infringed.

8 Now, I will talk to you about the  
9 validity of the patents.

10 Google contends that the asserted claims  
11 of the '025 and '059 patents are invalid. A patent  
12 issued by the United States Patent Office is presumed to  
13 be valid. In order to rebut this presumption, the  
14 Defendant must establish by clear and convincing  
15 evidence that an asserted claim of the patents-in-suit  
16 is not valid.

17 Clear and convincing evidence is a more  
18 exacting standard than proof by a preponderance of the  
19 evidence, which only requires that the party's claim be  
20 more likely true than not true.

21 When a party has the burden of proving  
22 any claim or defense by clear and convincing evidence,  
23 it means that the party must persuade you that it is  
24 highly probable that the facts are as that party  
25 contends.

1                   Nevertheless, the clear and convincing  
2 standard is not as high as the burden of proof applied  
3 in a criminal case, which is beyond a reasonable doubt.

4                   Each claim of a patent is presumed valid  
5 regardless of the status of any other claim in the  
6 patent. Google contends that the asserted claims of the  
7 '025 and '059 patents are invalid because they are  
8 anticipated or rendered obvious by the prior art.

9                   If you find by clear and convincing  
10 evidence that a claim is anticipated or obvious, then  
11 you should find that claim invalid and render a verdict  
12 for Google on that claim.

13                   Some of these instructions will refer to  
14 prior art. Prior art means technology and information  
15 that was publicly available before the date of the  
16 invention.

17                   In considering prior art, you should  
18 consider prior art that is relevant to the particular  
19 problem the inventor faced.

20                   Prior art includes:

21                   (1) patents issued more than one year  
22 before the filing of the patent or before the date of  
23 the invention;

24                   (2) publications having a date more than  
25 one year before the filing date of the patent or before

1 the date of the invention;

2 (3) United States patents having a filing  
3 date prior to the date of the invention of the subject  
4 matter in the patent;

5 (4) any process or apparatus in public  
6 use or on sale in the United States more than one year  
7 before the filing date of the patent in issue;

8 (5) any process or apparatus that was  
9 publicly known or used by others in the country before  
10 the date of the invention of the claimed subject matter  
11 in the patent;

12 And (5) any process or apparatus that was  
13 made or built in this country by another person before  
14 the date of the invention of the claimed subject matter  
15 in the patent and not abandoned, suppressed, or  
16 concealed.

17 Now, these instructions have sometimes  
18 referred to the date of invention. In this regard, you  
19 are instructed that there are two parts to the making of  
20 an invention.

21 The inventor has the idea of the  
22 invention. This is referred to as conception of the  
23 invention.

24 A conception of an invention is complete  
25 when the inventor has formed the idea of how to make and



1 use every aspect of the claimed invention and all that  
2 is required is that it be made without the need for any  
3 further inventive effort.

4           The actual making of the invention is  
5 referred to as reduction to practice. An invention is  
6 said to be reduced to practice when it is made and shown  
7 to work for its intended purpose.

8           Under the patent laws, the date of  
9 invention is generally the date that the patent  
10 application was filed. This is also referred to as  
11 constructive reduction to practice.

12           In this case, that date is January 10th,  
13 2000, for the '025 patent, and July 11th, 2002, for the  
14 '059 patent.

15           The public use of a product or process of  
16 a patent claim in the United States more than one year  
17 before the filing date of the application for the patent  
18 may be prior art to the patent claim.

19           First, the use must occur in the United  
20 States more than one year before the patent application  
21 was filed.

22           In this case, the '025 patent was filed  
23 on January 10th, 2000, so that date is January 10th,  
24 1999. And the '059 patent was filed on July 11th, 2003,  
25 so that date is July 11th, 2001.

1           The date of invention is irrelevant to  
2 this category of prior art. If the public use is more  
3 than one year before the patent application was filed,  
4 then that public use may be prior art regardless of the  
5 date of the invention.

6           Second, the use may be by anyone,  
7 including the inventor or patent owner.

8           Third, if the use was by someone other  
9 than the inventor, the use must have been accessible to  
10 the public in order to be prior art.

11           Fourth, commercial exploitation of the  
12 product or process constitutes public use even if there  
13 was a confidentiality agreement or circumstances existed  
14 creating a similar expectation of privacy or secrecy.

15           Commercial exploitation includes sale of  
16 the invention or a charge for use of the invention to  
17 generate commercial benefits.

18           Fifth, in order for a public use to be  
19 prior art, the invention must have been ready for  
20 patenting when it was used. An invention is ready for  
21 patenting if the product offered for sale has been  
22 developed to the point where there was reason to expect  
23 it would work for its intended purpose.

24           The product may be ready for patenting  
25 even if it is not ready for commercial production or has

1 not been technically perfected.

2           The sale or offer for sale in the United  
3 States of a product may be prior art to a patent claim  
4 covering the product or a method of making the product  
5 if the product was sold or offered for sale in the  
6 United States more than one year before the application  
7 for the patent was filed.

8           The date of invention for the patent  
9 claims is irrelevant to this category of prior art. If  
10 the sale or offer of sale of a product is more than one  
11 year before the patent application was filed, then the  
12 product or method of making it may be prior art,  
13 regardless of the date of invention.

14           Let's talk about anticipation.

15           The patent laws of the United States  
16 require that an invention must be new for a person to be  
17 entitled to a patent. Google contends that the asserted  
18 claims are invalid because they were not new or lacked  
19 novelty.

20           If an invention is not new, we say that  
21 it was anticipated by the prior art. An invention that  
22 is anticipated by the prior art is not entitled to  
23 patent protection.

24           In order for a patent claim to be  
25 anticipated by the prior art, each and every limitation

1 of the claim must be present within a single item of  
2 prior art, whether that prior art is a publication, a  
3 prior patent, a prior invention, a prior public use or  
4 sale, or some other item of prior art.

5           You may not find that the prior art  
6 anticipates a patent claim by combining two or more  
7 items of prior art.

8           In deciding whether or not a single item  
9 of prior art anticipates a patent claim, you should  
10 consider that which is expressly stated or present in  
11 the item of the prior art and also that which is  
12 inherently present.

13           Something is inherent in an item of prior  
14 art if it is always present in the prior art or always  
15 results from the practice of the prior art and if a  
16 skilled person would understand that to be the case.

17           Now let's talk about obviousness.

18           The Defendant also contends that the  
19 asserted claims of the '025 and '059 patents are invalid  
20 because the invention was obvious. Not all innovations  
21 are patentable.

22           A patent claim is invalid if the claimed  
23 invention would have been obvious to a person of  
24 ordinary skill in the field at the time the invention  
25 was made; in this case, January 10th, 2000, for the '025

1 patent and January 11th, 2002, for the '059 patent.

2           This means -- well, it's January 10th,  
3 2000, for the '025 patent, and July 11th, 2002, for the  
4 '059 patent.

5           This means that even if all of the  
6 requirements of the claim cannot be found in a single  
7 prior art reference, a person of ordinary skill in the  
8 field of art, who knew about all this prior art, would  
9 have come up with a claimed invention.

10           However, a patent claim composed of  
11 several elements is not proved obvious merely by  
12 demonstrating that each of its elements was  
13 independently known in the prior art.

14           In evaluating whether such a claim would  
15 have been obvious, you may consider whether the  
16 Defendant has identified a reason that would have  
17 prompted a person of ordinary skill in the field to  
18 combine the elements or concepts from the prior art in  
19 the same way as in the claimed invention.

20           There is no single way to define the line  
21 between true inventiveness, on one hand (which is  
22 patentable) and the application of common sense and  
23 ordinary skill to solve a problem, on the other hand  
24 (which is not patentable).

25           For example, market forces or other

1 design incentives may be what produced a change rather  
2 than true inventiveness.

3           You may consider whether the change was  
4 merely the predictable result of using prior art  
5 elements according to their known functions or whether  
6 it was the result of true inventiveness.

7           You may also consider whether there is  
8 some teaching or suggestion in the prior art to make the  
9 modification or combination of elements claimed in the  
10 patent.

11           Also, you should consider whether the  
12 innovation applies a known technique that had been used  
13 to improve a similar design in a similar way.

14           You may also consider whether the claimed  
15 invention would have been obvious to try, meaning that  
16 the claimed innovation was one of a relatively small  
17 number of possible approaches to the problem with a  
18 reasonable expectation of success by those skilled in  
19 the art.

20           However, you must be careful not to  
21 determine obviousness using the benefit of hindsight.

22           Many true inventions might seem obvious  
23 after the fact.

24           You should put yourself in the position  
25 of a person of ordinary skill in the field at the time

1 the claimed invention was made, and you should not  
2 consider what is known today or what is learned from the  
3 teaching of the patent.

4           The ultimate conclusion of whether a  
5 claim is obvious should be based on your determination  
6 of several factual decisions.

7           First, you must decide the level of  
8 ordinary skill in the field that someone would have had  
9 at the time the claimed invention was made.

10           Second, you must decide the scope and  
11 content of the prior art.

12           Third, you must decide what difference,  
13 if any, existed between the claimed invention and the  
14 prior art.

15           Where these matters are in dispute, the  
16 party asserting invalidity has the burden to establish  
17 that it is highly likely that its version of the facts  
18 is correct.

19           Finally, you should consider any of the  
20 following factors that you find have been shown by the  
21 evidence.

22           Now, the factors tending to show  
23 nonobviousness are:

24           (1) commercial success of a product due  
25 to the merits of the claimed invention;

1                   (2) a long-felt need for the solution  
2 provided by the claimed invention;

3                   (3) unsuccessful attempts by others to  
4 find the solution provided by the claimed invention;

5                   (4) unexpected and superior results from  
6 the claimed invention;

7                   (5) acceptance by others of the claimed  
8 invention, as shown by praise from others in the field  
9 or from the licensing of the claimed invention;

10                  (6) other evidence tending to show  
11 nonobviousness.

12                  And factors tending to show obviousness  
13 are:

14                   (1) independent invention of the claimed  
15 invention by others before or at about the same time as  
16 the named inventor thought of it;

17                  And (2) other evidence tending to show  
18 obviousness.

19                  The presence of any of the above factors  
20 that tend to show nonobviousness may be considered by  
21 you as an indication that the claimed invention would  
22 not have been obvious at the time the claimed invention  
23 was made, and the presence of any of the above factors  
24 that tend to show obviousness may be considered by you  
25 as an indication that the claimed invention would have



1 been obvious at such time.

2           Although you should consider any evidence  
3 of these factors, the relevance and importance of any of  
4 them to your decision on whether the claimed invention  
5 would have been obvious is up to you.

6           If you find that the Defendant has proved  
7 obviousness by the clear and convincing standard, then  
8 you must find that the claim is invalid.

9           Now, with respect to corroboration, you  
10 are instructed that corroboration is required of any  
11 witness whose testimony alone is asserted to invalidate  
12 a patent.

13           Both physical evidence, such as documents  
14 and things, and other oral testimony of a disinterested  
15 party can serve to satisfy the corroboration  
16 requirement.

17           In determining whether a witness'  
18 testimony is corroborated, you should consider the  
19 following factors:

20                   (1) the relationship between the  
21 corroborating witness and the alleged prior user;

22                   (2) the time period between the event and  
23 trial;

24                   (3) the interest of the corroborating  
25 witness in the subject matter in suit;

1                   (4) contradiction or impeachment of the  
2 witness' testimony;

3                   (5) the extent and details of the  
4 corroborating testimony;

5                   (6) the witness' familiarity with the  
6 subject matter of the patented invention and the prior  
7 use;

8                   (7) probability that a prior use could  
9 occur considering the state of the art at the time;

10                  And (8) impact of the invention on the  
11 industry and the commercial value of its practice.

12                  Now, with respect to damages, I will now  
13 instruct you as to the calculation of damages should you  
14 find that Function Media has met its burden on any of  
15 its claims.

16                  If you find that Google has infringed any  
17 of the asserted claims of Function Media's patents and  
18 that these claims are valid, then you should consider  
19 the amount of money Function Media should receive as  
20 damages.

21                  Function Media has the burden of proving  
22 by a preponderance of the evidence the amount of damages  
23 caused by Google's conduct.

24                  Even though I am instructing you on how  
25 you should measure damages, this should not be taken to

1 mean that I believe that Google has infringed the  
2 patents or that the patents are valid. These are issues  
3 for you to resolve under the instructions that I have  
4 given you.

5 I am instructing you on damages only so  
6 that you will have guidance should you decide that the  
7 Plaintiff is entitled to recover.

8 If you find that there has been an  
9 infringement and that these infringed claims are valid,  
10 the owner of a patent is entitled to an award of damages  
11 adequate to compensate for the infringement, but in no  
12 event less than a reasonable royalty for the use the  
13 Defendant made of the invention.

14 Function Media is asking for damages in  
15 the amount of a reasonable royalty. Generally, a  
16 reasonable royalty is defined by the patent laws as the  
17 reasonable amount that someone wanting to use the  
18 patented invention should expect to pay the patent owner  
19 and the owner should expect to receive.

20 A royalty is the amount of money a  
21 licensee pays to a patent owner for each article the  
22 licensee makes or uses or sells or offers to sell under  
23 the patent or for the right to use the claimed method.

24 A reasonable royalty is the amount of  
25 money a willing patent owner and a willing prospective

1 licensee would have agreed upon at the time of the  
2 infringement for a license to make, use, sell, or offer  
3 to sell the invention.

4           In making your determination of the  
5 amount of a reasonable royalty, it is important that you  
6 focus on the time period when the infringer first  
7 infringed the patent and the facts that existed at that  
8 time.

9           Your determination does not depend on the  
10 actual willingness of the parties to this lawsuit to  
11 engage in such negotiations. Your focus should be on  
12 what the party's expectations would have been had they  
13 entered negotiations for royalties at the time of the  
14 infringing activity.

15           The infringer's actual profits may or may  
16 not bear on the reasonableness of an award based on a  
17 reasonable royalty.

18           In determining the reasonable royalty,  
19 you should consider all of the facts known and available  
20 to the parties at the time the infringement began. Some  
21 of the kinds of factors that you may consider in making  
22 your determination are:

23           (1) whether the patent holder had an  
24 established royalty for the invention; in the absence of  
25 such a licensing history, any royalty arrangements that

1 were generally used and recognized in the particular  
2 industry at that time;

3 (2) the nature of the commercial  
4 relationship between the patent owner and the licensee,  
5 such as whether they were competitors or whether their  
6 relationship was that of an inventor and a promoter;

7 (3) the established profitability of the  
8 patented product, its commercial success, and its  
9 popularity at the time;

10 (4) whether the patent owner had an  
11 established policy of granting licenses or retaining the  
12 patented invention as its exclusive right or whether the  
13 patent holder had a policy of granting licenses under  
14 special conditions designed to preserve his monopoly;

15 (5) the size of the anticipated market  
16 for the invention at the time the infringement began;

17 (6) the duration of the patent and of the  
18 license, as well as the terms and scope of the license,  
19 such as whether it is exclusive or nonexclusive or  
20 subject to territorial restrictions;

21 (7) the rates paid by the licensee for  
22 the use of other patents comparable to the Plaintiff's  
23 patent;

24 (8) whether the licensee's sales of the  
25 patented invention promote sales of its other products

1 and whether the invention generates sales to the  
2 inventor of his nonpatented items;

3 (9) the utility and advantages of the  
4 patent property over the old modes or devices, if any,  
5 that had been used for working out similar results;

6 (10) the extent to which the infringer  
7 used the invention and any evidence probative of the  
8 value of such use;

9 (11) the portion of the profits in the  
10 particular business that are customarily attributable to  
11 the use of the invention or analogous inventions;

12 (12) the portion of the profits that  
13 should be credited to the invention as distinguished  
14 from nonpatented elements, the manufacturing process,  
15 business risks, or significant features or improvements  
16 added by the infringer;

17 (13) the opinion and testimony of  
18 qualified experts and of the patent holder;

19 And (14) any other factors which, in your  
20 mind, would have increased or decreased the royalty the  
21 infringer would have been willing to pay and the patent  
22 owner would have been willing to accept acting as  
23 normally prudent business people.

24 You may consider the existence of  
25 noninfringing alternatives. A noninfringing alternative

1 must possess all the beneficial characteristics of the  
2 patented device. The existence of a competing device  
3 does not make that device an acceptable substitute.

4           If purchasers are motivated to purchase  
5 because of the particular features available only from  
6 the patented product, products without such features,  
7 even if otherwise competing in the marketplace, would  
8 not be acceptable noninfringing substitutes.

9           You must not award the Plaintiff more  
10 damages than are adequate to compensate for the  
11 infringement nor shall you include any additional amount  
12 for the purpose of punishing the Defendant or setting an  
13 example.

14           You may not include damages that are  
15 speculative, damages that are only possible, or damages  
16 that are based on guesswork.

17           Now, nothing that I may have said or done  
18 during the course of this trial is intended to indicate  
19 any view of mine as to which party should or should not  
20 win this case.

21           As I instructed you previously, the jury  
22 is the sole judge of the credibility of the testimony  
23 and the weight to be given the evidence.

24           These instructions are given to you as a  
25 whole, and you are not to single out one instruction

1 alone as stating the law but must consider the  
2 instructions as a whole.

3           You have heard all of the evidence in the  
4 case, and you've heard the argument of counsel. The  
5 Court has given you the charge in this case.

6           In a few moments, you will retire to the  
7 jury room, select one of your members to act as a  
8 foreperson, and begin performing the function for which  
9 you have been chosen and for which you have been  
10 impaneled in accordance with the oath you took as  
11 jurors.

12           You will remember that at the beginning  
13 of the trial and throughout the trial, the Court  
14 admonished you not to discuss with each other until it  
15 was submitted to you.

16           Well, now is the time for you to begin  
17 your discussion, and you certainly may express an  
18 opinion from the evidence that you have heard and use  
19 any reasonable means to persuade other members of the  
20 jury to your convictions and to your honest opinion.

21           You are to reach a verdict which speaks  
22 the truth and which does justice to all parties without  
23 favor, bias, or prejudice in any particular way either  
24 for or against any party to this lawsuit.

25           In the course of your deliberations, do



1 not hesitate to re-examine your own views and change  
2 your opinion, if convinced it is erroneous. But do not  
3 surrender your honest conviction as to the weight or  
4 effect of the evidence solely because of the opinions of  
5 your fellow jurors or for the mere purpose of returning  
6 a verdict.

7           The verdict must represent the considered  
8 judgment of each juror. In order to return a verdict,  
9 it is necessary that each juror agree thereto. Your  
10 verdict must be unanimous.

11           As soon as you have reached a verdict,  
12 you will let this fact be known to the officer who will  
13 be waiting upon you, and he will be report to the Court.

14           Mr. Potts, are you going to be with the  
15 jury?

16           COURT SECURITY OFFICER: I will be, Your  
17 Honor.

18           THE COURT: Okay. Your verdict will be  
19 in the form of questions for you to answer. You'll take  
20 these questions to the jury room, and when you've  
21 reached a unanimous agreement as to your verdict, you'll  
22 have your foreperson fill in, date, and sign the form,  
23 and then advise the court security officer that you've  
24 reached a verdict.

25           During your deliberations, you may have

1 any of the exhibits which have been offered in evidence,  
2 and the Court will send them to you upon written  
3 request.

4           If you desire further instructions, your  
5 foreperson may make this known in writing, and the Court  
6 will try to comply with your wishes.

7           All communications with the Court must be  
8 in writing, but at no time should you indicate to the  
9 Court or to anyone else how the jury is divided in  
10 answering any particular question.

11           Any notes that you have taken during this  
12 trial are only aids to your memory. If your memory  
13 should differ from your notes, then you should rely on  
14 your memory and not on the notes. The notes are not  
15 evidence.

16           A juror who has not taken notes should  
17 rely on his or her independent recollection of the  
18 evidence and should not be unduly influenced by the  
19 notes of other jurors. Notes are not entitled to any  
20 greater weight than the recollection or impression of  
21 each juror concerning the testimony.

22           Now, you are now in control of your  
23 schedules. I'll tell you mine. I'm going to break for  
24 lunch, and then I've got a proceeding to handle this  
25 afternoon. I will break that proceeding if I get a

1 communication from you-all related to this case. So, in  
2 other words, y'all have priority, okay?

3 Now, when I say you're in charge of your  
4 own schedules, that means if you, you know, get to a  
5 point this afternoon and want to take a break from  
6 deliberations, you're in charge of when you can take  
7 your breaks and how long they last, okay?

8 I'm just telling you, I'll not -- I'll be  
9 at lunch probably from -- for the next hour or so, and  
10 then my proceeding starts at 1:30. So I'll be  
11 available, you know, beginning in an hour, if you need  
12 to communicate with me, okay?

13 With that, I will hand the questions to  
14 the court security officer, and you will follow him into  
15 the jury room, select one of your members as foreperson,  
16 and begin your deliberations.

17 COURT SECURITY OFFICER: All rise for the  
18 jury.

19 (Jury out.)

20 THE COURT: All right. Any additional  
21 objections to the charge as read from the Plaintiff?

22 MR. NELSON: No, Your Honor.

23 THE COURT: From the Defendant?

24 MR. VERHOEVEN: No, Your Honor.

25 THE COURT: Okay.

1 MR. DEFRANCO: Well, one second. I'm  
2 sorry, Your Honor.

3 (Counsel confer.)

4 MR. VERHOEVEN: No, Your Honor.

5 THE COURT: Okay.

6 MR. NELSON: May we just put on the  
7 record what we agreed to, that it was an agreed charge  
8 on --

9 THE COURT: With respect to the  
10 instruction on noninfringing alternatives, that charge  
11 was agreed to -- or that jury instruction was agreed to  
12 by the parties. That was my understanding from the  
13 Plaintiff's standpoint --

14 MR. NELSON: Yes, Your Honor.

15 THE COURT: -- and from the Defendant.

16 MR. DEFRANCO: Your Honor, there was -- I  
17 would just like to note, if it's asked to be reread,  
18 there was a little confusion in the edit that was made.  
19 I think the word mere was taken out.

20 I had -- in any case, I'd like to just  
21 note that for the record, that if they ask it to be  
22 reread, I think the sentence, as edited, doesn't make  
23 precise sense.

24 THE COURT: Well --

25 MR. DEFRANCO: I just wanted to note that

1 in case it comes up again.

2 THE COURT: Well, does the sentence, as  
3 read, reflect the agreement that was reached in chambers  
4 before I read it?

5 MR. DEFRANCO: Yes, Your Honor.

6 THE COURT: Okay. All right. All right.

7 Court's in recess pending communication  
8 from the jury.

9 I need y'all to start clearing out some  
10 of the boxes, but please don't have your technical folks  
11 take down their equipment, because one thing that often  
12 happens is I get requests from the jury to review  
13 demonstratives or slides, and my practice is not to send  
14 demonstratives back to the jury room, but if there is a  
15 request to see slides, to bring the jury back into the  
16 courtroom for purposes of -- of viewing demonstratives  
17 in the courtroom.

18 So I don't want there to be a long time  
19 the jury has to wait before coming in to view  
20 demonstratives. So that's all I ask.

21 I'll conduct my other proceeding  
22 downstairs, but at some point, Judge Ward is going to  
23 want his courtroom back, okay?

24 Thank y'all.

25 MR. VERHOEVEN: Just for the record, Your

1 Honor, in my experience, I've had courts not allow  
2 jurors to see demonstratives. If there's a request, I'd  
3 just -- for the record, I want to preserve my right to  
4 see if I want -- I may file and ask for an objection.

5 THE COURT: I'll allow you to make  
6 whatever objections you want --

7 MR. VERHOEVEN: Thank you, Your Honor.

8 THE COURT: -- at the time the request is  
9 made, okay?

10 MR. VERHOEVEN: Thank you, Your Honor.

11 THE COURT: All right. Court's in  
12 recess.

13 (Recess.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/\_\_\_\_\_  
SUSAN SIMMONS, CSR  
Official Court Reporter  
State of Texas No.: 267  
Expiration Date: 12/31/10

\_\_\_\_\_  
Date

/s/\_\_\_\_\_  
SHELLY HOLMES, CSR  
Deputy Official Court Reporter  
State of Texas No.: 7804  
Expiration Date 12/31/10

\_\_\_\_\_  
Date